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No. 05-

IN THE

# Supreme Court of the United States

JOHN GATES, *et al.*,
*Petitioners*,

v.

JANICE AKINS, *et al.*,
*Respondents*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether *Hope v. Pelzer*, 536 U.S. 730 (2002), changes this Court's qualified immunity jurisprudence set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Saucier v. Katz*, 533 U.S. 194 (2001) such that it strips public officials of their entitlement to qualified immunity in factually and legally complex First Amendment retaliation cases simply because the official was on notice that the employees' "speech as whistleblowers was protected," *see Akins v. Fulton County*, 420 F.3d 1293, 1308 (11th Cir. 2005), even when the District Court and the Eleventh Circuit acknowledge the complexity of the legal issues and the Court of Appeals remands the case to the District Court with instructions that a jury should decide the legal question regarding the main thrust of the speech.

II. Whether the Eleventh Circuit's decision to strip Petitioner of his entitlement to qualified immunity in a factually and legally complex First Amendment retaliation case comports with this Court's qualified immunity jurisprudence, which instead dictates that qualified immunity should be preserved when the law is not clearly established in a particularized and relevant sense.

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Janice Akins,
Appellant Below.

Debra Blount,
Appellant Below.

Natalie Revell,
Appellant Below.

John Gates,
Appellee Below.

Pursuant to Rule 29.6, Petitioners state that the named Petitioners do not have any corporate parent, subsidiary, or affiliate that is publicly held.

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No. 05-___

JOHN GATES, *et al.*,

*Petitioners*,

v.

JANICE AKINS, *et al.*,

*Respondents*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

John Gates, ("Petitioner"), former Director of the Fulton County Purchasing Department requests that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit which stripped him of his entitlement to qualified immunity in a factually and legally complex First Amendment retaliation case centering on mixed public-private speech allegedly leading to Janice Akins and Debra Blount ("Respondents") being constructively discharged from their employment.[1] As reflected in two District Court Orders and the Eleventh

[1] The Eleventh Circuit did not strip Petitioner of his entitlement to qualified immunity with respect to Natalie Revell's claim of First Amendment retaliation, holding that "neither this Circuit nor the Supreme Court has yet to recognize the claim of 'constructive transfer' as an adverse employment action." *Akins v. Fulton County*, 420 F.3d 1293, 1306 (11th Cir. 2005).

Circuit Opinion prompting this Petition, the facts and the law surrounding this case are difficult to analyze. Indeed, the Eleventh Circuit itself was unable to determine the important question of law at issue, *i.e.*, whether the "main thrust" of the speech at issue in this case was for private gain or public concern. *Akins v. Fulton County*, 420 F.3d 1293, 1304 (11th Cir. 2005) ("Due to the nature of the meeting and the status of the official, ***a reasonable jury could conclude*** that the 'main thrust' of the meeting was not for private gain, but rather of public concern.") (emphasis supplied). Thus, the question of law, whether Respondents' speech is protected, must now be determined by a jury. If after a lengthy trial the jury decides that the speech is not protected, only then will Gates' qualified immunity be reinstated. *See id.* at 1308 ("I would like to emphasize that there is a disputed question of fact as to whether the 'main thrust' of the August 27, 1998 meeting was to discuss bidding irregularities, as Plaintiffs allege, or general work environment concerns, as Commissioner Darnell claims. This issue is best resolved by a jury, and not on a motion for summary judgment.") (Black, J., concurring).

The Eleventh Circuit thus concluded that the threshold legal question of whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern, a question of law, *see Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), as modified by *Connick v. Myers*, 461 U.S. 138 (1983), should be determined by a jury. The Eleventh Circuit arrived at this unusual First Amendment retaliation result by reexamining the District Court's grant of qualified immunity to Petitioner through the lens of *Hope v. Pelzer*, 536 U.S. 730 (2002). Thus, the denial of Petitioner's entitlement to qualified immunity in this case based on purportedly clearly established law in the First Amendment retaliation and constructive discharge contexts, and leaving that decision to a jury, decides an important federal question in a way that conflicts with relevant decisions of this Court which define the contours of the doctrine of qualified

immunity. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'") (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The most important question in this petition is the Eleventh Circuit's reliance on a generalized principal of First Amendment law, that Respondents' "speech as whistleblowers was protected by the First Amendment," which directly contradicts this Court's instruction in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Thus, "the relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("As we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.") (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). Moreover, *Saucier* established that the relevant question is not whether Petitioner's actions were expressly authorized by existing law, but whether they were clearly *forbidden*—i.e., whether a reasonable official would have known the actions in question were illegal. *Saucier* at 202. Given the factually and legally complex First Amendment retaliation issues centering on mixed public-private speech that Petitioner in this case must have discerned in August 1998 when he allegedly constructively discharged Respondents, it was not clear to Petitioner in this case that his conduct was unlawful. As this issue must now be decided by a

jury, it still is not clear that Petitioner's conduct was unlawful. Therefore, based on *Anderson* and *Saucier*, Petitioner's entitlement to qualified immunity should be restored.

## OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, appended hereto at Pet. App. 1a, is reported at 420 F.3d 1293 (11th Cir. 2005). The order of the district court denying Respondents' Motion for Reconsideration, appended hereto at Pet. App. 23a, is not reported. The order of the district court granting Petitioner's Motion for Summary Judgment, appended hereto at Pet. App. 58a, is not reported.

## STATEMENT OF JURISDICTION

The Eleventh Circuit entered its order and judgment on August 17, 2005. *See* Pet. App. 1a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision set forth below:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

This case involves the following statutory provision, the pertinent portions of which are set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

> of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS.

Petitioner is the former Director of the Fulton County Purchasing Department and Respondents are former employees of that department. *See* Pet. App. 2a. Petitioner supervised Respondents, who were employed as contracting officers. *Id.* Respondents and Petitioner began having workplace conflicts as early as late 1997. *See* Pet. App. 60a. On August 27, 1998, Respondents met with Emma I. Darnell, a member of the Fulton County Board of Commissioners ("Commissioner Darnell") to complain about Petitioner. Respondents contend that they mainly discussed bid irregularities observed under Petitioner's leadership with Commissioner Darnell, although they admit they also discussed personal issues regarding Petitioner's management style. *See* Pet. App. 2a. Commissioner Darnell testified that Respondents mainly discussed workplace issues, and that she did not recall any discussions of bid irregularities during the August 27, 1998 meeting. *See* Pet. App. 13a.

After the August 27, 1998 meeting with Commissioner Darnell, Respondents contend that Petitioner immediately retaliated against them by, among other things: (1) issuing written warnings to Blount and Revell for eavesdropping; (2) ostracizing and isolating Respondents from their co-workers (*e.g.*, prohibiting other employees from communicating with them); (3) interrogating employees who did communicate with Respondents; (4) forcing Respondents to publicly display their time sheets (while other employees were not so required); (5) taking away Respondents' job duties for a

period of time; and (6) lowering Akins' performance rating from "exceeds expectations" to "meets expectations" after she refused to change her notes regarding statements made by Blount during her exit interview. *See* Pet. App. 3a-4a. As a result of Gates' alleged conduct, Respondents contend that they were constructively discharged from their jobs in the Purchasing Department. *See* Pet. App. 9a.

## II. PROCEEDINGS BELOW.

On August 25, 2000, Respondents filed this suit under 42 U.S.C. § 1983, alleging that Petitioner, as well as Vanessa Reynolds and Fulton County, Georgia, retaliated against them for engaging in protected speech in violation of the First Amendment. The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343. On March 28, 2003, the district court granted summary judgment to all defendants. *See* Pet. App. 58a. Specifically, the district court held that Petitioner was entitled to qualified immunity.[2] *See* Pet. App. 84a-85a. On March 31, 2004, the district court denied Respondents' Motion for Reconsideration. *See* Pet. App. 23a. On August 17, 2005, the Eleventh Circuit reversed in part and affirmed in part the district court's decision. *See* Pet. App. 1a.

## REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's shift in its qualified immunity analysis of First Amendment retaliation cases conflicts with this Court's decisions in *Anderson* and *Saucier*. The Eleventh Circuit held that Petitioner had fair warning of the unlawfulness of his acts simply by reference to *Pickering* and *Connick*, and thereby stripped him of his entitlement to

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[2] The District Court additionally granted summary judgment to Fulton County, Georgia (for failure to show a custom or practice of First Amendment retaliation or that Petitioner was a final decision maker) and Vanessa Reynolds (also based on qualified immunity). Respondents did not appeal these elements of the District Court's opinion.

qualified immunity. *Pickering* and *Connick* stand for the general proposition that public officials cannot retaliate against employees who exercise their First Amendment rights by speaking out on matters of public concern. By stripping Petitioner of his entitlement to qualified immunity based on these general propositions of law, the Eleventh Circuit departed from the particularized analytical framework required by this Court in *Anderson* and *Saucier*.

The doctrine of qualified immunity shields public employees from liability for civil damages if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. "The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." *Hope*, 536 U.S. at 736 (citing *Saucier*, 533 U.S. at 201). In this case, the threshold inquiry cannot be, and has not been resolved. Indeed, if the Eleventh Circuit's opinion is allowed to stand, a jury will resolve this threshold legal inquiry. This is improper. *See Gardetto v. Mason*, 100 F.3d 803, 817 (10th Cir. 1996) ("the district court erred by instructing the jury that it could perform the balancing test that *Pickering* and *Connick* require the court to perform.") (citing *Wren v. Spurlock*, 798 F.2d 1313, 1318 (10th Cir. 1986) and *Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281-82 (9th Cir. 1983)).

In this case, Respondents' allegations, if true, ***may or may not*** establish a constitutional violation, depending on whether a jury decides that the main thrust "of the August 27, 1998 meeting was to discuss bidding irregularities, as Plaintiffs allege, or general work environment concerns, as Commissioner Darnell claims." *Akins*, 420 F.3d at 1308 (Black, J., concurring). If a jury must determine the legal question of a constitutional violation *vel non* in this case, it is impossible to conclude that Petitioner was on notice that his conduct was unlawful in August 1998 when he allegedly retaliated against

Respondents. Uncertainty about the status of the law in a particular case dictates that qualified immunity should be granted, as opposed to being denied.

Indeed, the sweep of qualified immunity is necessarily broad. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The policy considerations driving such a rule are straightforward: government officials exercising their official discretion in the discharge of their duties cannot live in constant fear of lawsuits, with the concomitant costs to public servant and society. Such fear will stymie the work of government and will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814. In this case, neither the District Court nor the Eleventh Circuit could ascertain whether or not Respondents' speech was protected. The Eleventh Circuit, instead of affirming the District Court's grant of qualified immunity, sent the qualified immunity question to a jury. Thus, the Eleventh Circuit erroneously stripped Petitioner of his entitlement to qualified immunity. Undeniably, the driving principle of qualified immunity is to provide public officials with "fair warning" that their conduct in a given circumstance deprived an individual of a constitutional right. *United States v. Lanier*, 520 U.S. 259, 270-271 (1997). In this case, Petitioner still does not know whether Respondents' speech is protected, or whether his conduct violated the constitution.

Moreover, the very nature of the First Amendment retaliation legal analysis in this case weighs against the conclusion that the law governing Petitioner's conduct herein is clearly established. As the district court reasoned:

> Given the fact that plaintiffs' speech combined matters of public concern with matters that concerned only employees, it would arguably not be obvious to a

> retaliating official that the plaintiffs had sufficiently spoken out on matters of public concern so as to invest their speech with First Amendment protection. If it is unclear whether plaintiffs' complaints were of the kind held to involve a matter of public concern, then defendants' alleged actions did not violate clearly established First Amendment rights, and they are entitled to qualified immunity. *Badia v. City of Miami*, 133 F.3d 1443, 1445 (11th Cir. 1998) (citations omitted). That is, expression of personal dissatisfaction within an otherwise protected speech context may remove cases from "inevitable" status under the *Pickering* balance. *Cooper v. Smith*, 89 F.3d 761, 766 (11th Cir. 1996) (citing *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989) and *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994)).
>
> In other words, confusion and argument over whether plaintiffs spoke on matters of public concern or personal matters means that a reasonable person might not necessarily know that both prongs of the *Pickering-Connick* test had been met, requiring a conclusion that the defendants enjoy qualified immunity. Stated another way, a reasonable person could arguably not have predicted with any certainty how a court would rule on plaintiffs' claims.

*Akins v. Fulton County*, No. 1:00-CV-2212-JEC (N.D. Ga. Mar. 28, 2003). *See* Pet. App. 83a-84a. Simply put, if the Eleventh Circuit and the District Court were unable to determine the "main thrust" of Respondents' speech, then no reasonable public official can be held to have notice that any alleged retaliation, including constructive discharge, may have violated the constitution.

**I. The Eleventh Circuit Applied *Hope v. Pelzer*, 536 U.S. 730 (2002), To Strip Petitioner Of His Entitlement To Qualified Immunity On A Factually And Legally Complex First Amendment Retaliation Question Even When Both The District Court And The Court Of Appeals Acknowledged The Complexity Of The Legal Issues And The Court Of Appeals Remanded The Case To The District Court With Instructions That A Jury Should Decide The Legal Question. In Such A Case, The Eleventh Circuit's Qualified Immunity Analysis Should Have Followed The Framework Set Forth In *Anderson v. Creighton*, 483 U.S. 635 (1987) And *Saucier v. Katz*, 533 U.S. 194 (2001), And The Grant Of Qualified Immunity Should Have Been Affirmed.**

Following this Court's instruction in *Hope* to reverse its "rigid gloss" on the qualified immunity standard, the Eleventh Circuit has swung the pendulum too far in the opposite direction by relying on a general principle of law to strip a public official of his entitlement to qualified immunity in a factually and legally complex First Amendment case. *Akins*, 420 F.3d at 1307. Despite its own inability to discern whether the speech at issue in this case is protected, *see id.* at 1304 ("a reasonable jury could conclude that the 'main thrust' of the meeting was not for private gain, but rather of public concern"), the Eleventh Circuit held that Petitioner is not entitled to qualified immunity because he "was at least on notice of *Pickering* and *Connick*, which set forth the standard for protection of the speech of public employees." *Akins* at 1307. Additionally, and in direct contradiction to its holding that a reasonable jury may decide whether the Respondents' speech was protected, the Eleventh Circuit further held that *Bryson v. City of Waycross*, 888 F.2d 1562 (11th Cir. 1989) and *Walker v. Schwalbe*, 112 F.3d 1127 (11th Cir. 1997),

(despite *Walker's* conflict, from a lay view, with *Martin v. Baugh*, 141 F.3d 1417 (11th Cir. 1998))[3], put Gates on notice that Respondents' "speech as whistleblowers was protected by the First Amendment." *Akins* at 1308.

The Eleventh Circuit's application of *Hope* in this case has decided an important federal question in a way that conflicts with relevant decisions of this Court and decisions of other circuits on this same important matter. *See Pickering*, 391 U.S. at 569 ("Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."); *accord Ferrara v. Mills*, 781 F.2d 1508, 1513 n. 5 (11th Cir. 1986) (same); *City of San Diego, Cal. v. Roe*, 125 S.Ct. 521, 525 (2004) (acknowledging that the boundaries of the public concern test in *Connick* are not well-defined); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989) ("Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful."); *Goffer v. Marbury*, 956 F.2d 1045, 1050 (11th Cir. 1992) ("Determinations of public concern, and the balancing itself, require ad hoc case-by-case application. The

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[3] Respondents below relied on *Walker* to argue that Petitioner was on notice that their speech was protected. Petitioner relied on *Martin* to argue that he was entitled to qualified immunity because the law was not clearly established that speech similar to Respondents' is protected. The Eleventh Circuit acknowledged the factual similarity of these cases, and discussed the different outcomes, *Walker* denying qualified immunity and *Martin* granting qualified immunity, extensively. *Akins* at 1306-07. The Eleventh Circuit's analysis of these cases further shows that a reasonable official would not know that his conduct violated the constitution.

cases are, therefore, not good sources for rules of general application"); *Wernsing v. Thompson*, 423 F.3d 732, 750 (7th Cir. 2005) (finding that the district court failed to follow the instruction of the Supreme Court in *Saucier*, 533 U.S. at 201-02, in framing "the clearly established inquiry in terms of a general proposition" rather than "in light of the specific context of the case" and concluding that "no defendant could ever prevail on the clearly established prong of the qualified immunity analysis" under the district court's analysis). Indeed, just like the analysis rejected by the Seventh Circuit in *Wernsing*, under the Eleventh Circuit's analysis of qualified immunity in this case "no defendant could ever prevail on the clearly established prong of the qualified immunity analysis." *Wernsing*, 423 F.3d at 750.

Though public employees possess a First Amendment right to free speech, this right is not absolute. *Pickering*, 391 U.S. at 568. It is well-established that if public employees are to establish a prima facie case of First Amendment retaliation, they must demonstrate that: (1) their speech can be fairly characterized as relating to a matter of public concern; (2) their First Amendment interests outweigh the government's interest as an employer; and (3) their speech played a substantial part in the government's decision to demote or discharge them. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick*, 461 U.S. at 146; *Pickering*, 391 U.S. at 568. If a prima face case is established, then the government employer must show (4) that "its legitimate reason, standing alone, would have induced it to make the same decision." *Bryson*, 888 F.2d at 1566 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)). Importantly, satisfying the public concern prong of the test also determines whether the law was clearly established for purposes of qualified immunity analysis. *Williams v. Alabama State Univ.*, 102 F.3d 1179, 1183 (11th Cir. 1997) (conducting threshold inquiry of whether plaintiff's speech was on a matter of public concern to determine if the law was clearly established that the defendant's

conduct violated the First Amendment and holding the speech was not).

Since *Hope*, the Eleventh Circuit has emphasized three sources for finding clearly established law or, alternatively, three ways in which an official can be given fair warning. First, the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct is unlawful. *See Hope*, 536 U.S. at 741; *Vineyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002). Second, under certain circumstances, case law might set forth a broad principle with such obvious clarity that the principle itself will clearly establish the law for future cases regardless of any factual variations. *See Hope*, 536 U.S. at 740; *Vineyard*, 311 F.3d at 1351. Third, in most cases where the law is established by judicial precedents, notice can be given by preexisting cases with indistinguishable facts. *See Vineyard*, 311 F.3d at 1351. If the facts of prior precedents are "fairly distinguishable from the circumstances facing a government official," however, the law is not clearly established and qualified immunity attaches. *Hope*, 536 U.S. at 740-41 (there are cases where a high degree of prior factual particularity may be necessary) (quoting *U.S. v. Lanier*, 520 U.S. at 270-71); *Vineyard*, 311 F.3d at 1351-52.

The Eleventh Circuit placed this case in the second category and, in essence, labeled it an "obvious clarity" case. This case, however, is not an "obvious clarity" case in the context of First Amendment retaliation analysis. Indeed, given the coexistence of the *Walker* and *Martin* cases at the time of Petitioner's conduct, confusion existed with regard to the application of First Amendment law to the facts of this case. Nor is this a case where a general constitutional principle applied with "obvious clarity" to Petitioner's conduct, given that the case law on First Amendment retaliation in the Supreme Court, the Eleventh Circuit and throughout

the Courts of Appeals instructed Petitioner that he would rarely (if ever) be on notice that his conduct is unconstitutional. *Pickering*, 391 U.S. at 569; *City of San Diego, Cal. v. Roe*, 125 S.Ct. at 525; *accord Ferrara*, 781 F.2d at 1513 n. 5; *Dartland*, 866 F.2d at 1323; *Goffer*, 956 F.2d at 1048-50; *Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998) (joining "the chorus of voices from other circuits [including the "voice" of the Eleventh Circuit] that have specifically observed the difficulty of finding clearly established law under *Pickering*"); *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (same); *O'Connor v. Steeves*, 994 F.2d 905, 917 n. 11 (1st Cir. 1993) (same); *Guercio v. Brody*, 911 F.2d 1179, 1183-85 (7th Cir. 1990) (same). Moreover, the conflict between factually similar case law in this Circuit, *Walker* and *Martin*, also establishes that this case is not an "obvious clarity" case. Resolution of this conflict through application of the "prior precedent" rule, as the Eleventh Circuit did, only adds to the confusion because few, if any, public officials seeking qualified immunity would be aware of this specialized "prior precedent" rule. *Akins*, 420 F.3d at 1307, n. 5.

This Court has previously held that whether a right has been clearly established must be determined in a particularized fashion and not on the basis of broadly stated principles of law. In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court reversed the decision of the Eighth Circuit denying an FBI agent's motion for summary judgment based on qualified immunity. The Eighth Circuit had held that the right of persons to be protected from warrantless searches of their homes absent probable cause or exigent circumstances was clearly established; thus, the FBI agent was not entitled to qualified immunity for violating that right. This Court found that approach too general to serve the ends espoused for qualified immunity in *Harlow*.

Rather than proceed upon the basis of general rules of law, *Anderson* held that courts must look more deeply to the particularized circumstances of each case.

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." (Citation omitted). It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, (citation

> omitted); but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

*Anderson*, 483 U.S. at 639-640.

Similarly, this analytical framework based on the context of the "clearly established right" governed this Court's decision in *Saucier*, *supra*. "This inquiry ... must be undertaken in light of the specific context of the case." *Saucier*, 533 U.S. at 201.

> Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. . . .
>
> The approach the Court of Appeals adopted—to deny summary judgment any time a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."

*Id.* at 201-202 (citations omitted). This "more particularized" inquiry is an important element of the qualified immunity analysis and serves a critical purpose.

> In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in the proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so

> that the costs and expenses of trial are avoided where the defense is dispositive.

*Id.* at 200. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 200-201 (emphasis in original). "As a result, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Id.* at 201 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*)).

The Eleventh Circuit's analysis in this case simply adopts the general proposition of *Pickering* and *Connick* that liability may be grounded in retaliation by government officials for their employees' exercise of First Amendment rights as sufficient to give such officials fair warning of the unlawfulness of such retaliation. The Eleventh Circuit wholly failed to engage in a particularized analysis. This approach fails to apply the test required by *Anderson* and *Saucier* of moving beyond the general pronouncement to look at the particular circumstances of the case at issue. The Eleventh Circuit's analysis in this case fails to provide any consideration as to whether Petitioner, in the particular circumstances of *this* case, had fair warning of the nature of *his* conduct in August, 1998. That failure constitutes an abdication of the responsibility placed on the courts to make precisely that particularized determination. For this reason, the petition should be granted.[4]

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[4] Additionally, Petitioner is not on notice that he violated clearly established law regarding the alleged constructive discharge at issue in this case, as *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551 (11th Cir. 1997) involved a private employer, as opposed to a public employer, and did not analyze the issue in the context of public employment or qualified immunity.

## II. The Eleventh Circuit's Decision To Strip Petitioner Of His Entitlement To Qualified Immunity On A Factually And Legally Complex First Amendment Retaliation Question And To Send The Legal Question Of Protected Speech To A Jury Contradicts This Court's Qualified Immunity Jurisprudence, Which Instead Dictates That Qualified Immunity Should Be Preserved When The Law Is Not Clearly Established As To Whether The Public Official's Conduct Violated The Constitution.

The first two prongs of the *Pickering-Connick* test present questions of law. The last two are questions for the jury. *See Rankin v. McPherson*, 483 U.S. 378, 386, n. 9 (1987) ("The ultimate issue—whether the speech is [on a matter of public concern]—is a question of law."); *Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1318 (11th Cir. 2005) ("The first two steps [of the *Pickering* test] are questions of law; the final two steps are 'questions of fact designed to determine whether the alleged adverse employment action was in retaliation for the protected speech.'"). Because an employee's speech will rarely be entirely private or entirely public, the main thrust of the employee's speech must be determined. *Connick*, 461 U.S. at 147-48 (determining whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee). The first prong is a threshold inquiry into whether the employee's speech may be "fairly characterized as constituting speech on a matter of public concern." This inquiry is a question of law to be decided by the court. *Connick*, 461 U.S. at 148 n. 7. In determining the "main thrust," a court must look at the form, context and content of the speech. *Connick*, 461 U.S. at 147-48.

In the instant case, the Eleventh Circuit held that "due to the nature of the meeting and the status of the official, ***a reasonable jury could conclude*** that the 'main thrust' of the meeting was not for private gain, but rather of public

concern." *Akins*, 420 F.3d at 1304 (emphasis supplied). As a result, the Eleventh Circuit stripped Petitioner of his entitlement to qualified immunity by remanding a difficult question of law to be determined by a reasonable jury.

It is well-established that determining whether a public employee's speech is on a matter of public concern is a question of law based on the record as a whole. *Connick*, 461 U.S. at 147-48 n. 7 ("The inquiry into the protected status of speech is one of law, not fact"). Despite the fact-intensive nature of the analysis, it is the court's responsibility to make this threshold finding, in the light most favorable to the non-moving party, and not a jury. As this Court has explained:

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect. (citations omitted). Because of this obligation, we cannot 'avoid making an independent constitutional judgment on the facts of the case.' (citations omitted).

*Connick*, 461 U.S. at 150 n. 10. *See also*, *Luck v. Mazzone*, 52 F.3d 475, 476 (2nd Cir. 1995) (determining whether an employee's speech addresses a matter of public concern is a question of law to be determined in light of the content, form, and context of a given statement, as revealed by the whole record); *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178 (5th Cir. 2005) ("Whether the speech at issue is on a matter of public concern is a question of law that must be determined by the court."); *Farhat v. Jopke*, 370 F.3d 580, 589 (6th Cir. 2004) (analyzing, as a question of law, the issue of whether plaintiff's speech was on a matter of public concern, even

though there may be some factual questions regarding the speech); *Taylor v. Carmouche*, 214 F.3d 788, 792 (7th Cir. 2000) (holding that the lower court's "remov[al] from the jury's purview the decision whether the . . . grievances and protests dealt with matters of public concern," was proper because "their status is a question of law rather than fact, so the court rather than the jury is the proper decision-maker."); *de Llano v. Berglund*, 282 F.3d 1031, 1036 (8th Cir. 2002) (matter of public concern inquiry is a question of law for the court to decide); and *Lewis v. Harrison Sch. Dist. No. 1*, 805 F.2d 310, 313 (8th Cir. 1986) (finding no precedent for use of a jury finding on the issue of public concern). Thus, the Eleventh Circuit's decision to remand to a jury the question of whether the speech at issue in this case is a matter of public concern decides an important federal question in a way that conflicts with relevant decisions of this Court and conflicts with decisions of other circuits on the same important matter.

## CONCLUSION

As set forth in this Petition, the Eleventh Circuit in *Akins* has applied *Hope* in a way that conflicts with this Court's precedent in *Anderson* and *Saucier*. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed August 17, 2005]

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No. 04-11888

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D.C. Docket No. 00–02212-CV-JEC-1

JANICE AKINS, DEBRA BLOUNT, NATALIE REVELL,
*Plaintiffs-Appellants*,

versus

FULTON COUNTY, GEORGIA, JOHN GATES, Individually,
VANESSA REYNOLDS, Individually,
*Defendants-Appellees*.

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Appeal from the United States District Court
for the Northern District of Georgia

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**(August 17, 2005)**

Before BLACK and WILSON, *Circuit Judges*, and NANGLE*, *District Judge*.

WILSON, *Circuit Judge*:

In this case we review a decision granting a public employee qualified immunity with respect to Plaintiffs' claim of First Amendment retaliation. The district court granted qualified immunity after determining that the law regarding constructive discharge and protected speech was not clearly established. We think that it was. However, because one of

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* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

the Plaintiffs did not resign, but requested and received a favorable transfer, she cannot state a claim for constructive discharge. We reverse in part and affirm in part the district court's order granting summary judgment in favor of Defendant John Gates.[1]

## I. BACKGROUND

Plaintiffs are former employees of the purchasing department of Fulton County, Georgia. Debra Blount and Natalie Revell were employed as contracting officers. Janice Akins supervised both Blount and Revell as Contracting Division Chief and Assistant Purchasing Agent for Contracting. Defendant Gates is the department's director and ultimate supervisor of all three Plaintiffs.

In 1998, Plaintiffs began to notice several "irregularities" in the purchasing department's process for bidding and contracting. They claim that some transactions did not follow the department's rules and regulations. Plaintiffs and some of their coworkers requested and were granted a meeting with Fulton County Commissioner Emma Darnell for the afternoon of August 27, 1998. On the morning of the meeting, Gates spoke with one of Plaintiffs' coworkers, allegedly "lectur[ing]" her on the consequences of attending the meeting with Commissioner Darnell. According to Plaintiffs, many of their coworkers decided not to attend because of Gates's "intimidation." Plaintiffs allege that, although they discussed general work environment concerns at the meeting, the "main thrust" of their conversation was a discussion of these bidding irregularities, referring specifically to six bids in their affidavits. In addition, Plaintiffs identified six other bids that they discussed with Commissioner Darnell on later occasions.

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[1] Plaintiffs have abandoned their claims against Defendant Vanessa Reynolds and Fulton County. We therefore affirm the district court's grant of summary judgment as to these parties.

Plaintiffs concede that their work relationship with Gates had not been perfect, but they claim that things took a turn for the worse after the meeting. For example, one of Plaintiffs' coworkers revealed in his affidavit that, on the day of the meeting, Gates instructed employees not to communicate or associate with Plaintiffs. Another coworker stated that Gates intimidated employees to keep them from speaking with Plaintiffs. According to Plaintiffs, their friends within the department would no longer speak with them, and others would walk in the other direction when they saw Plaintiffs. Also on August 27, 1998, Blount and Revell received written warnings from Gates for eavesdropping, which they found in their offices upon returning from the meeting.

In the weeks and months that followed, Plaintiffs claim that Gates continued to single them out unfavorably. In September of 1998, Gates "berated" Blount for taking notes in a staff meeting, and Akins was informed that she was not to attend a year-end closeout meeting that she had attended throughout her career. A week later, Gates accused Blount of sabotaging a bid.

In October, Plaintiffs attended a Board of Commissioners meeting, as it was customary for purchasing officers to do. Plaintiffs were told by Gates's assistant that Gates wanted them to leave the meeting. They were not permitted to attend subsequent Board meetings. Gates also instructed Plaintiffs to turn over files for several projects, relieving them of the bulk of their work duties. After approximately one-and-a-half months without work, Gates claimed that there had been a misunderstanding and returned to Plaintiffs some, but not all, of their duties. On October 14, 1998, Gates accused Blount and Revell of sabotaging a bid. The next day, Gates ordered Plaintiffs to display their time sheets publicly, even though other employees were permitted to keep their time sheets private.

In December, Gates asked Blount and Revell for assistance with what they said was "unethical behavior," though they did not explain what constituted this behavior. Gates also sent Akins a letter accusing her of poor management of employees.

On January 7, 1999, Gates wrote Akins a memo threatening to suspend her for insubordination. Akins claims that this resulted from a December 1, 1998 meeting at which Gates directed her to train the staff on a computer system for which she herself had not been trained. On January 12, 1999, Gates gave Akins a memo identical to the January 7 memo, except for the date.

By this time, Blount had decided to resign due to the bid irregularities and the resulting retaliation, including Gates's accusations of sabotage. Akins conducted Blount's exit interview on January 19, 1999, when Blount revealed her reasons for leaving. Akins claims that afterwards, Gates tried to coerce her into changing Blount's written comments concerning the reasons for her departure. Allegedly in response to Akins's refusal to changing Blount's comments, Gates prepared a written performance evaluation of Akins on that same day in which he lowered her rating from "exceeds expectations" to "meets expectations." Akins did not receive this evaluation, but only learned of it when she received her personnel records in August of 2000 during discovery for this litigation.

In addition, Plaintiffs allege that Gates again accused Revell of sabotage by forging Gates's signature on documents and discarding papers. Revell also went through several office changes, including two moves in one day and a move from an office to a cubicle. Finally, Akins stated that Gates repeatedly reprimanded her for allowing Blount and Revell to report bid irregularities.

Plaintiffs bring a claim under 42 U.S.C. § 1983, arguing that these events, considered either individually or in the aggregate, constitute First Amendment retaliation by Gates. The district court granted summary judgment in favor of Gates based on qualified immunity. Plaintiffs appeal.

## II. STANDARD OF REVIEW

We review grants of summary judgment based on qualified immunity *de novo*. *Durruthy v. Pastor*, 351 F.3d 1080, 1084 (11th Cir. 2003). A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). On a summary judgment motion, we resolve all reasonable doubts and make all justifiable inferences in the non-movants' favor. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000). Thus, we consider the facts in the light most favorable to Plaintiffs. *Id.*

## III. DISCUSSION

A government official acting within his discretionary authority is eligible for qualified immunity when the facts "[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right" and when "the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). We apply this two-step analysis below, addressing the threshold question of discretionary authority first.

**A. Discretionary Authority**

To benefit from qualified immunity, a government official must make a threshold showing that his actions were undertaken pursuant to performance of his duties within the scope of his authority. *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990). Plaintiffs do not dispute that Gates was acting within his discretionary authority when he issued reprimands, threatened job loss or suspension, relieved Plaintiffs of work duties and then reprimanded them for not performing that work, and excluded them from meetings. We agree that these actions clearly fall within the range of Gates's discretionary authority.

**B. Violation of a Constitutional Right**

The next step in the qualified immunity inquiry is to determine whether the plaintiffs' allegations, if true, establish a constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S. Ct. 2508, 2513 (2002). For a public employee to establish that an employer conditioned her job in a way that burdened a constitutional right impermissibly, "the employee must first demonstrate that the asserted right is protected by the Constitution and that he or she suffered an 'adverse employment action' for exercising the right." *See McCabe v. Sharrett*, 12 F.3d 1558, 1562 (11th Cir. 1994). Once the employee makes these two showings, "the employee is entitled to prevail if the adverse employment action was taken in such a way as to infringe the constitutionally protected right." *Id.* (citations omitted).

***1. Constitutionally Protected Right***

The Supreme Court has recognized that the Constitution protects speech regarding governmental misconduct because it "lies near the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632, 110 S. Ct. 1376, 1381 (1990). Though not an absolute right, *see Virginia v. Black*, 538 U.S.

343, 358, 123 S. Ct. 1536, 1547 (2003), the right to free speech is a fundamental one that warrants strict scrutiny, *see Elrod v. Burns*, 427 U.S. 347, 362, 96 S. Ct. 2673, 2684 (1976). The right implicated in this case is certainly a constitutionally protected right, entitling Plaintiffs to a determination of whether Gates has impermissibly infringed that right. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1566 (11th Cir. 1989) (noting that "a core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption").

**2. *Adverse Employment Action***

"To be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment." *Stavropoulos v. Firestone*, 361 F.3d 610, 619 (11th Cir. 2004), *cert. denied*, __ U.S. __, 125 S. Ct. 1850 (2005). A public employee states a case for retaliation when the alleged employment action would likely chill the exercise of constitutionally protected speech. *See id.* at 618. We have decided that, as a matter of law, important conditions of employment include discharges, demotions, refusals to hire or promote, and reprimands. *Id.* (citing *Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992)). In addition, any other conduct that "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee" qualifies as an adverse employment action. *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000) (quotation and citation omitted). Thus, if an employer's conduct negatively affects an employee's salary, title, position, or job duties, that conduct constitutes an adverse employment action. *See Stavropoulos*, 361 F.3d at 620. Constructive discharge negatively affects an employee's job status, and therefore constitutes an adverse employment action. *See Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013,

1021 (11th Cir. 1994).[2] In other words, where working conditions are so intolerable that a reasonable person would have felt compelled to resign, the employer's conduct is an adverse employment action. *See Durley v. APAC, Inc.*, 236 F.3d 651, 658 (11th Cir. 2000) (defining constructive discharge). Similarly, a transfer to a less desirable position in terms of pay or eligibility for pay increases is an adverse employment action because it is equivalent to a demotion. *See McCabe*, 12 F.3d at 1564.

Importantly, "we have never held that the list cannot be expanded, so long as the action impacts an important condition of employment." *Stavropoulos*, 361 F.3d at 620. Therefore, we are not prevented from recognizing additional adverse employment actions, such as a "constructive transfer," where work conditions become so intolerable that an employee asks to be transferred to a less desirable position with a lower salary, loss of benefits, or with fewer opportunities for salary increases. We have not previously recognized the concept of "constructive transfer." If we were to recognize such a claim as actionable, a plaintiff presumably could state a claim based on that action so long as work conditions are sufficiently intolerable, and the transfer sufficiently adverse.

In deciding whether employment actions are adverse, we consider the employer's acts both individually and collectively. *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002) ("While the other actions of which [the plaintiff] complains might not have individually risen to the

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[2] Although *Meeks* involved a Title VII claim, we noted in *Stavropoulos* that while we have not explicitly equated the First Amendment retaliation's "important condition of employment" with Title VII's adverse employment action requirement, we regularly use First Amendment cases to inform our analysis of Title VII retaliation claims. 361 F.3d at 619-20. We observed that the two standards are consonant. As this is our practice, we cite some Title VII cases to inform our analysis here.

level of adverse employment action . . . , when those actions are considered collectively, the total weight of them [can] constitute an adverse employment action." (internal quotation and citation omitted)).[3]

Plaintiffs allege that they suffered the following adverse employment actions: unwarranted reprimands, a negative work evaluation, threat of job loss through dissolution of the contracting division, threat of suspension without pay, exclusion from meetings, removal of job duties (followed by reprimands for not completing that work), and constructive discharge. Of the adverse employment actions alleged by Plaintiffs, only constructive discharge or constructive transfer can be said to have negatively affected them. Plaintiffs have not alleged that the reprimands or the threats of suspension and job loss affected the terms and conditions of their employment or their status as employees. Nor have they made any claim that the exclusion from meetings or removal of job duties adversely affected the terms and conditions of their employment. Furthermore, although a negative work evaluation can constitute an adverse employment action under some circumstances, *see Gillis v. Ga. Dep't of Corr.*, 400 F.3d 883, 888 (11th Cir. 2005), there is no evidence in the record that Akins's compensation was or would be adversely affected by the evaluation.

Even when considered in the aggregate, these actions are not adverse. *Cf. Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455 (11th Cir. 1998). In *Wideman*, we held that improperly listing an employee as a no-show when she was not scheduled for work, written reprimands resulting in a one-day suspension, soliciting negative comments but no positive comments about the employee from other employees, failing to schedule the employee for work, and delaying authorization of medical treatment, considered collectively, was an

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[3] *See supra* note 2.

adverse employment action. *Id.* at 1455-56. As compared with the actions at issue here, the suspension and the delay in authorization for medical treatment did affect Wideman's status as an employee and her benefits, respectively. Furthermore, failing to schedule her for work or marking her as a no-show would affect her compensation and status as an employee. Finally, although soliciting negative comments from coworkers is not in itself an adverse employment action, the employer ultimately could use the comments in combination with the employee's no-show to justify discharge.

In this case, by contrast, we do not think that the actions (exclusive of constructive discharge) rise to that level of substantiality required by our caselaw. Thus, whether considered individually or collectively, these employment actions cannot be considered "adverse" because they did not harm Plaintiffs. *See Gupta*, 212 F.3d at 589. Nonetheless, we will consider these actions because they are relevant to Plaintiffs' constructive discharge claim, to which we now turn.

To prove constructive discharge, Plaintiffs must demonstrate that working conditions were so intolerable that reasonable persons in their position would have felt compelled to resign. *See Durley*, 236 F.3d at 658. Furthermore, for a constructive discharge claim to present a jury issue and thereby survive summary judgment, the plaintiff must produce substantial evidence that conditions were intolerable. *See Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1155 (11th Cir. 2002).

In *Poole v. Country Club of Columbus, Inc.*, we found that the plaintiff had presented enough evidence that a reasonable person in her position could have found it intolerable when she was "[s]tripped of all responsibility, given only a chair and no desk, and isolated from conversations with other workers." 129 F.3d 551, 553 (11th Cir. 1997). Therefore, we held that Poole's constructive discharge claim survived summary judgment. *Id.*

With regard to the facts before us, only Akins and Blount resigned, and therefore only these two Plaintiffs can state a claim for constructive discharge. To support their claim, Akins and Blount have produced evidence showing that their work duties were removed and that they were excluded from meetings. They have also alleged that Gates instructed their coworkers not to talk with them. To further isolate them from their colleagues, all three Plaintiffs were required to display their time sheets publicly when their colleagues were not. Most serious is the claim that Gates accused Blount of sabotaging bids by engaging in illegal behavior. Finally, Akins and Blount did in fact resign in response to this conduct.

Considering the facts in the light most favorable to Akins and Blount, and comparing these facts with the facts of *Poole*, we see no material distinction between them. As such, Akins and Blount have alleged an adverse employment action sufficient to sustain a claim for First Amendment retaliation.

With respect to Revell, however, because she requested and received a transfer from her employer, she cannot state a claim for constructive discharge. At most, she can claim "constructive transfer." Revell revealed in her deposition that after her transfer, she retained her pay, vacation, and sick leave, and was even reclassified to a higher pay rate. The sole difference between the positions is that Revell can use her certification as a Certified Public Professional Buyer (CPPB) only in her former position. According to Revell, qualifying for a CPPB requires taking classes and passing certain testing modules. Because she will not be using her CPPB in her new position, Revell appears to argue that the transfer limits her career opportunities.

As noted above, for employment actions to be "adverse," they must be "objectively serious and tangible enough" to alter a plaintiff's "compensation, terms, conditions, or privileges of employment, deprive . . . her of employment opportunities or adversely affect[] . . . her status as an employee."

*Gupta*, 212 F.3d at 588. We have held the standard for determining whether transfers are adverse is an objective one. *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1450 (11th Cir. 1998). In that case, we agreed with our sister circuits that transfers are adverse "only where the transfers were *objectively* equivalent, at least to some degree, to demotions." *Id.* (emphasis added).

From the record before us, Revell's inability to use her CPPB certification does not appear to be objectively equivalent to a demotion. Because Revell has failed to allege facts sufficient to allow a trier of fact to conclude that this employment action was adverse, she cannot succeed in establishing her entitlement to relief. To be clear, we make no judgment as to the wisdom of recognizing the concept of constructive transfer as an adverse employment action. We do not hold that such a cause of action exists, or that it is categorically unactionable. We merely hold that the facts as alleged by Revell do not entitle her to relief.

Moreover, as we explain below, Revell cannot show that this law was clearly established. Therefore, Gates is entitled to qualified immunity with respect to Revell's claim. Before turning to the question of clearly established law, however, we continue to the next step in the analysis of Plaintiffs' claim (excluding Revell)—whether they have alleged the violation of a constitutional right.

### 3. *Violation of Constitutional Right*

It is well established in this circuit that, for a public employee to establish a prima facie case of First Amendment retaliation, she must show: 1) that the speech can be fairly characterized as relating to a matter of public concern, 2) that her interests as a citizen outweigh the interests of the State as an employer, and 3) that the speech played a substantial or motivating role in the government's decision to take an adverse employment action. *See Bryson*, 888 F.2d at 1565. If

the plaintiff can establish these elements, the defendant is given the opportunity to rebut the presumption of retaliation by proving that it would have made the same decision even if the speech at issue had never taken place. *Id.* at 1566.

For speech to be protected as speech on a matter of public concern, "it must relate to a matter of political, social, or other concern to the community." *Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir. 1997). If the speech at issue is personal in nature, and "cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Meyers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983). Even if Plaintiffs discussed private concerns regarding their work environment in the meeting, that does not disqualify them from protection. It is well understood that "[a]n employee's speech will rarely be entirely private or entirely public." *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993). We take into account the content, form, and context of the speech to glean its "main thrust." *Id.* at 754 (citations omitted). If the "main thrust" of a public employee's speech is on a matter of public concern, then the speech is protected. *Id.* at 754-55.

Commissioner Darnell indicated in her deposition that she did not recall discussing bid irregularities at the August 27 meeting, though she conceded that the subject came up in later meetings. By contrast, Plaintiffs specifically refer to six bids discussed with Commissioner Darnell in that meeting. A reasonable jury could find that Commissioner Darnell's recollection of that meeting was incomplete. Thus, considered in the light most favorable to Plaintiffs, the speech was of public concern.[4]

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[4] Upon reconsideration, the district court found it "striking" that Plaintiffs did not respond to Commissioner Darnell's deposition. The court

Furthermore, the form and context of Plaintiffs' speech bolster their argument that the speech was public in nature. Instead of discussing the bids and work environment in a private, informal meeting, Plaintiffs requested a special meeting with a public official, one of the members of the governing body of the county. *Compare Watkins v. Bowden*, 105 F.3d at 1353-54 (employee's "informal and private comment . . . that [she] found the speaker's comments offensive, without more, does not constitute speech affecting a matter of public concern"), *with Cooper v. Smith*, 89 F.3d 761, 765 (11th Cir. 1996) (reporting corruption in police department to state bureau of investigation involved issue of public concern), *and Martinez v. City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir. 1992) (providing testimony before city commission concerning purchasing practices of city affected matter of public concern). Due to the nature of the meeting and the status of the official, a reasonable jury could conclude that the "main thrust" of the meeting was not for private gain, but rather of public concern.

Next, we consider whether Plaintiffs' speech is protected when measured against the government's interest in the efficient provision of public services. Because Plaintiffs are public employees, and the government has an interest in preventing speech that is disruptive to the efficient rendering of public services, we balance the employee's and the government's interests as instructed in *Pickering v. Board of Education* to determine whether the speech merits protection. *See* 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968); *see also Stough v. Gallagher*, 967 F.2d 1523, 1526-28 (11th Cir. 1992). A "core concern" of the First Amendment is the protection of whistleblowers who report government wrongdoing. *Bryson*, 888 F.2d at 1566. As a result, Plaintiffs'

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surmised that Plaintiffs thereby accepted her characterization of the meeting. We disagree because this conflict is a genuine issue of fact that ought to be resolved by the factfinder, not at the summary judgment stage.

interest in this speech is high. Conversely, Fulton County's interest in preventing this kind of speech is low. As the district court noted, preventing Plaintiffs' speech would not seem to aid the government's interest in efficiency, since the speech would bring the alleged wrongful practices to light and lead to more efficient provision of public services. Plaintiffs' speech thus qualifies for protection under the *Pickering* test.

We turn next to consider causation, deciding whether the speech played a "substantial part" in the government's decision. Plaintiffs have presented evidence that working conditions deteriorated significantly after the meeting with Commissioner Darnell. Though working conditions had been strained prior to the meeting, Defendant's most severe alleged actions—removing their work duties, isolating Plaintiffs from their coworkers, and accusing them of sabotage—occurred after the meeting. Furthermore, all three Plaintiffs resigned or transferred out of their department within ten months of the meeting. This close temporal proximity between the meeting and Gates's actions suggest a causal relationship. *See Gupta*, 212 F.3d at 590. Based on this relationship, a reasonable factfinder could conclude that Gates took these actions on account of Plaintiffs' speech.

The final step in the First Amendment retaliation analysis allows the employer to avoid liability if it can prove that it would have taken the same actions in the absence of the protected speech. Because Gates has not presented any arguments or evidence that he would have acted in the same manner absent Plaintiffs' meeting with Commissioner Darnell, he cannot avoid liability on this basis.

**C. Clearly Established Law**

The final step in the qualified immunity inquiry is determining whether the law was clearly established so as to put Gates on notice that his behavior was a violation. A right

is clearly established if, in light of already-existing law, the unlawfulness of the conduct is "apparent." *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). Thus, "[i]f reasonable public officials could differ on the lawfulness of a defendant's actions, the defendant is entitled to qualified immunity." *Storck v. City of Coral Springs*, 354 F.3d 1307, 1314 (11th Cir. 2003). To demonstrate that the law is clearly established, a party is not required to cite cases with materially similar facts. *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516. Rather, the state of the law at the time of the unconstitutional act must be established sufficiently to give "fair warning" to the official that his conduct is unlawful. *Id.* Therefore, a constitutional provision can give fair warning when its words are specific enough that they "establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the total absence of case law." *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002).

**1. *Fair Warning That Employment Action Was Adverse***

Plaintiffs argue that *Poole v. Country Club of Columbus, Inc.* provides fair warning that Gates's actions constituted constructive discharge. *See* 129 F.3d 551. The district court held, to the contrary, that *Poole* cannot serve as fair warning because it merely held that a reasonable jury could find that the plaintiff had suffered constructive discharge, not that those acts actually constituted a constructive discharge.

In categorically holding that *Poole* cannot serve as fair warning of the unlawfulness of a defendant's conduct, the district court erred. The practical effect of our holding in *Poole* is that the facts of the case constitute constructive discharge as a matter of law. Of course, based on the posture of the case, these facts were viewed in the light most favorable to the plaintiff. This does not alter the effect of the holding: that the facts of *Poole*, if believed, constitute constructive discharge. A holding by this Court that a

particular set of facts raises a question of material fact sufficient to preclude summary judgment serves as fair warning to officials. *See, e.g., Vinyard*, 311 F.3d at 1348 (citing as support *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002), which reviewed a district court's disposition of a summary judgment motion).

Because Gates's conduct occurred after we issued the opinion in *Poole*, and because the facts in that case are so similar to the ones we consider here with respect to Akins and Blount, Gates was on notice that his acts would constitute constructive discharge.

With respect to Revell, however, her claim must fail because neither this Circuit nor the Supreme Court has yet to recognize the claim of "constructive transfer" as an adverse employment action. Therefore, Gates was not put on notice that his actions would violate clearly established law. Thus, Gates is entitled to qualified immunity with respect to Revell's claim of First Amendment retaliation.

***2. Fair Warning That Plaintiffs' Speech Was Protected***

In arguing that Gates was on notice that Plaintiffs' speech was protected, Plaintiffs rely on *Walker v. Schwalbe*, 112 F.3d 1127 (11th Cir. 1997). Gates, on the other hand, cites *Martin v. Baugh*, 141 F.3d 1417 (11th Cir. 1998), for the proposition that the law was not clearly established. Because these cases are factually similar, and because their legal import has been changed by the Supreme Court's decision in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, they merit discussion in greater detail.

In *Walker*, a 1997 decision, the plaintiff, an employee of the state-sponsored Vista Community Programs, approached his superiors to complain that some budget practices violated regulations and prevented him from effectively managing the budgets for which he was responsible. In response, his superiors began to withhold budget information from Vista

employees. When Walker's efforts to discuss these issues with his direct superiors failed, he sought help from state legislators. During a meeting with several state representatives and senators, Walker discussed possible improprieties in Vista's budget practices, which led to an investigation of Vista.

After the release of the investigative report, Walker suffered adverse employment actions, purportedly because he had hired his wife in violation of the state's employment policy. We concluded that the plaintiff was a whistleblower demoted in retaliation for his speech, and stated that a reasonable governmental official would have known in 1991 that he could not punish an employee for such First Amendment-protected speech, and thus, the defendants were not entitled to qualified immunity. *Walker*, 112 F.3d at 1132.

In *Martin v. Baugh*, decided in April of 1998, the City of Birmingham solicited bids for an upgrade of its communications system. Two companies placed bids using two different industry standards. After rejecting both bids, the City entered into private negotiations with one of the companies, which resulted in a contract. Concerned that the system offered by that company was inferior to that offered by the other company, the plaintiff Martin, a city employee, spoke with a City Councilman and the Fraternal Order of Police and disseminated technical information to them comparing the two systems. In addition, Martin questioned the bidding standards upon which the prevailing company had submitted its bid.

Martin conducted his speech activities without the knowledge of his supervisor, Baugh. When Baugh learned of Martin's activities, Baugh accused Martin of insubordination and suggested that he resign. In addition, Baugh gave Martin written reprimands and assigned some of his duties to another employee.

In deciding the case, we observed that Martin's allegations did not establish a constitutional violation. We based our primary holding on the "clearly established" prong of the qualified immunity test. We noted that "Martin points to no case, and we find none after our own search, that would have made it obvious to a person in Baugh's position that Martin's speech . . . was constitutionally protected." *Martin*, 141 F.3d at 1421.

Importantly, we decided *Martin* before the Supreme Court released its decision in *Hope v. Pelzer*. In that case, the Court held that the facts of previous cases need not be "materially similar" to the facts at hand to furnish fair warning of a violation. 536 U.S. at 741, 122 S. Ct. at 2516. The Court explained that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Id.* at 741, 122 S. Ct. at 2516 (quotation and citation omitted, alteration in original).

Thus, the Court reversed our "rigid gloss" on the qualified immunity standard and gave guidance for future decisions. *Id.* at 739, 122 S. Ct. at 2515. We return to our consideration of *Martin* with this instruction in mind. In that case, we noted the following:

> Because both prongs [of the *Pickering-Connick* test] involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors that inform an application of the . . . test. . . . Consequently, a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful. Unless the plaintiff can either produce a case in which speech

> materially similar to his in all *Pickering-Connick* respects was held protected . . . , or show that, on the facts of the case, no reasonable person could believe that both prongs had *not* been met, he cannot defeat a defense of qualified immunity.

*Martin*, 141 F.3d at 1420 (citations omitted). *Martin*'s statements regarding the qualified immunity standard are not binding because the case was decided before *Hope v. Pelzer*. Post-*Hope*, as instructed by the Supreme Court, we are compelled to engage in a different analysis.[5] Furthermore, *Martin* has limited value in determining whether the law was clearly established because the case made no finding as to whether the defendant's conduct established a constitutional violation. Thus, the case that is closest in time and similar with regard to its facts does not resolve the issue of whether the law was clearly established because *Martin* declined to make a finding of constitutional violation *vel non*.

Following *Hope*'s instructions, we find that Gates was at least on notice of *Pickering* and *Connick*, which set forth the standard for protection of the speech of public employees. *See, respectively*, 391 U.S. 563, 88 S. Ct. 1731; *and* 461 U.S. 138, 103 S. Ct. 1684. Because *Martin* makes no finding with respect to whether the defendant there violated the Constitution, it could not provide notice to the defendant. And, fully consistent with our pre-*Hope* caselaw, we found in *Martin* no case that would have made it obvious to the defendant that the plaintiff's speech was protected. Indeed, because we referred only to decisions with materially similar facts to

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[5] Our "prior precedent rule" provides an additional rationale for our holding that *Walker* is relevant for determining the state of the law at the time of Gates's actions. "Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (*en banc*). *Walker* was first in time, and therefore, to the extent that *Walker* and *Martin* conflict, *Walker* controls.

guide us, it is not surprising that we found no relevant decision. Again, that Court's evaluation of the case law and its relation to the qualified immunity analysis is not controlling because it predates *Hope v. Pelzer*.

Using the *Hope* standard, we find in addition that *Bryson*, 888 F.2d at 1566, and *Walker*, 112 F.3d at 1131, put Gates on notice that Plaintiffs' speech as whistleblowers was protected by the First Amendment. Consonant with our analysis above, these cases together provide fair warning to Gates that speech whose "main thrust" is to report bidding irregularities to a public official in a meeting requested for that purpose is protected by the First Amendment.

## IV. CONCLUSION

For the foregoing reasons, we reverse the order of the district court granting summary judgment to defendant Gates with respect to Akins and Blount, and affirm as to Revell.

**AFFIRMED IN PART, REVERSED IN PART.**

No. 04-11888, *Akins v. Fulton County* BLACK, *Circuit Judge*, concurring:

I concur in the result reached by the majority. I would like to emphasize that there is a disputed question of fact as to whether the "main thrust" of the August 27, 1998 meeting was to discuss bidding irregularities, as Plaintiffs allege, or general work environment concerns, as Commissioner Darnell claims. This issue is best resolved by a jury, and not on a motion for summary judgment.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed March 31, 2004]

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Civil Action No. 1:00-CV-2212-JEC

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JANICE AKINS, DEBRA BLOUNT, and NATALIE REVELL
*Plaintiffs*,

v.

FULTON COUNTY, GEORGIA, JOHN GATES,
and VANESSA REYNOLDS,
*Defendants*.

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### ORDER

This case is presently before the Court on Plaintiffs' Motion for Reconsideration [48]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that Plaintiffs' Motion for Reconsideration [48] should be **DENIED**.

### *BACKGROUND*

Plaintiffs Janice Akins, Debra Blount, and Natalie Revell filed this action on August 25, 2000. At all times relevant to this action, plaintiffs were employed by defendant Fulton County in the Fulton County Purchasing Department. Plaintiffs alleged in their Complaint that they spoke out on matters of public concern and were unlawfully retaliated against by the defendants for exercising their First Amendment rights to free speech when defendants visited various adverse employment actions upon them and eventually constructively discharged them from their positions. Defendants denied plaintiffs' allegations and argued that they are

entitled to summary judgment as a matter of law. All defendants argued that plaintiffs' First Amendment rights were not violated. Further, the two individual defendants argued that they are protected from liability by qualified immunity. Defendant Fulton County argued that it may not be held liable because it had no official policy that injured plaintiffs and because the individual defendants were not final policy makers regarding actions concerning plaintiffs.

On March 28, 2003, this Court entered an Order [43] granting summary judgment to all defendants.[1] The Court granted summary judgment to Fulton County because the plaintiffs failed to make either of the showings required to hold a local governmental entity liable under 42 U.S.C. § 1983. Namely, plaintiffs failed to show either that Fulton County had any policy or custom of retaliation that injured them or that defendants Gates and Reynolds, who allegedly took the adverse actions against them, were final policy makers. Instead, the uncontroverted evidence showed that meaningful administrative review existed to examine the decisions of these individual defendants to determine if they constituted the type of adverse employment actions that plaintiffs alleged. The Court's ruling as to defendant Fulton County is not at issue in this Motion to Reconsider.

The Court also granted summary judgment to individual defendants Gates and Reynolds on qualified immunity grounds. Yet, the Court also noted that, even if it were to conclude that the defendants did not enjoy a qualified immunity defense as to the First Amendment claim, the Court would still have to decide whether the defendants could be charged with knowledge that the alleged retaliatory acts they

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[1] The Court presumes some familiarity with the background of this case and that Order and will not engage in a verbatim repetition of the facts of this case that appeared therein. In short, any reader of this Order should read the earlier Order to understand the legal and factual context in which this Order arises.

visited upon plaintiffs would necessarily constitute a constructive discharge. (Order [43] at 38.) The Court noted that there was little briefing on this point by the parties, and that, due to the fact-specific nature of the qualified immunity inquiry and because the facts asserted by plaintiffs were not as precisely drawn as they could be, the Court desired for the relevant facts to be better organized for the purpose of review. (*Id.* at 40.) The Court therefore permitted the plaintiffs to file, within thirty days of the entry of the Order, a motion for reconsideration setting out certain factual and legal points. Specifically, the Court directed that:

> First, *each plaintiff shall set out precisely the alleged retaliatory acts that each defendant allegedly visited* on the particular plaintiff. . . . As to the retaliatory acts attributed to each defendant, the *plaintiffs shall demonstrate that clearly established law would alert a reasonable official that the retaliation constitutes a constructive discharge*, which is the adverse action alleged by plaintiffs in their complaint.
>
> As to the question *whether defendants are protected by qualified immunity*, plaintiffs and defendants may respond in whatever way they deem persuasive, given the Court's analysis, thus far, of this question. Thereafter, the Court will issue a final order on defendants' motions.

(*Id.* at 40-41 (underlined emphasis added) .) The plaintiffs have filed such a pleading, and the two individual defendants have responded.

## *DISCUSSION*

### I. *First Amendment Retaliation*

As the Court explained in its previous Order [43], to find even potential liability under the First Amendment, a court must first apply the four-part *Pickering-Connick* balancing

test. The plaintiff must satisfy three of the prongs of the test by demonstrating (1) that her speech may be fairly characterized as constituting speech on a matter of public concern; (2) that the value of her speech outweighed the government's legitimate interest in efficient public service; and (3) that her protected speech played a substantial part in the defendant's decision to retaliate against her. (Order [43] at 28.) To defeat qualified immunity, the plaintiff must show that the law was clearly established enough to have alerted a reasonable government official in the defendant's position (1) that the plaintiff's speech involved a matter of public concern and (2) that the value of this speech would outweigh its potential for undermining the efficiency of the workplace.[2] (*Id.* at 28-29.)

In its earlier Order, the Court noted that the plaintiffs had sufficiently established, for purposes of summary judgment, that the defendants knew that the plaintiffs had made the protected speech in question: the complaints to Commissioner Darnell. (*Id.* at 29.) The Court noted, however, that the plaintiffs must also demonstrate that clearly established law would have caused a reasonable public official to conclude that plaintiffs' complaints touched on a matter of public concern. (*Id.* at 30.) This showing is a very difficult one for a plaintiff in any First Amendment retaliation case to make. Indeed, because any analysis of a retaliation claim under the *Pickering-Connick* test will "involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, it is nearly impossible . . . to predict how a court will weigh the myriad factors that inform an application" of the test. *Martin v. Baugh*, 141 F.3d 1417, 1420 (11th Cir. 1998) (citing *Goffer v. Marbury*, 956 F.2d 1045, 1048-50 (11th Cir. 1992)). "Consequently, a defendant in a First Amendment suit will only rarely be on notice that his

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[2] The third and fourth prongs of the balancing test are not the subject of this qualified immunity analysis. (Order [43] at 29 n.5.)

actions are unlawful." *Id.* To establish such notice, the plaintiff will have to "either produce a case in which speech materially similar to [hers] in all *Pickering-Connick* respects was held protected . . . or show that, on the facts of [her] case, no reasonable person could believe that both prongs of the test had *not* been met. . ." *Id.* (internal citation omitted).

In short, because of the nature of First Amendment law in public employee retaliation cases, the "fair and clear notice" that is "the cornerstone of qualified immunity" must almost certainly be imparted to defendants by the holding of a fact-specific case or cases. *See Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (citing *Marsh v. Butler County*, 268 F.3d 1014, 1031-33 (11th Cir. 2001) (en banc)). The fact-sensitive nature of legal judgments in this context means that this cannot be an "obvious clarity" case, in which the words of the pertinent federal constitutional provision would be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, "even in the *total absence of case law*." *Id.* (emphasis in original). Nor is this the type of case in which broad statements of principle in case law that are not tied to particularized facts can clearly establish law applicable in the future to different sets of detailed facts. *Id.* at 1351. (citing *Marsh*, 268 F.3d at 1031–32 n.9). Instead, the Court must look at precedent that is tied to the facts. *Id.* The Court must look for cases in which the Supreme Court, the Eleventh Circuit, or the pertinent state supreme court has said that particular conduct is unconstitutional in particular circumstances. *Id.*

Each party again posits the same Eleventh Circuit case that each had earlier advanced as a case that resolved the matter in the particular party's favor. First, plaintiffs again rely on *Walker v. Schwalbe*, 112 F.3d 1127, 1128-30 (11th Cir. 1997), in which the Eleventh Circuit, in three separate opinions, found no qualified immunity, where a plaintiff had been

demoted after complaining to state legislators about systemic problems in the area's VISTA program that employed plaintiff. Citing *Pickering v. Board of Educ. of Township High Sch. Dist.*, 391 U.S. 563 (1968), and *Bryson v. City of Waycross*, 888 F.2d 1562, 1565–66 (11th Cir. 1989), the panel concluded [3] that the law was clearly established in 1991, the time when defendants acted, that a whistle-blower, such as plaintiff, "could not be punished for his First Amendment speech." *Id.* at 1133. The panel noted that *Pickering* held that criticism of the Board of Education's allocation of school funds by an employee was a matter of public concern and that *Bryson* stated that a "core concern" of the First Amendment is protection of whistle-blowers who "expose government corruption." *Id.* (citing *Pickering*, 391 U.S. 563 and *Bryson*, 888 F.2d at 1566). Accordingly, the *Walker* panel denied qualified immunity.

Plaintiffs again rely on this case, arguing that their facts (Fulton County procurement employees complaining to Fulton County Commissioner) are similar enough to the facts in *Walker* (VISTA employee complaining to state legislator about systemic problems and improprieties in management of program) to have placed the defendants on notice that plaintiffs' speech fulfilled the requirement of the first two prongs of the balancing test. Indeed, this Court has previously noted that it finds similarities in the conduct described in *Walker* and in this case. (*See* Order [43] at 34.)

Defendants likewise continue to rely on an Eleventh Circuit case issued approximately one year after *Walker* and only four months before the retaliatory conduct by the defendants in this case began. In *Martin v. Baugh*, 141 F.3d

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[3] Actually, the majority opinion was written by a visiting senior judge from the Ninth Circuit. The two Eleventh Circuit panel members each filed a separate concurring opinion. Nevertheless, the Court does not read these concurring opinions as expressing disagreement with the holding of the "majority" opinion, as articulated *infra*.

1417 (11th Cir. 1998), the facts are even closer to those presented by the instant case than are the facts set out in *Walker*. Specifically, in *Martin*, the plaintiff, a city employee, complained to a city council member that the city was violating its own bid procedures when it solicited bids for upgrading its communications system.[4] Plaintiff had not notified his supervisor prior to articulating these concerns, and his supervisor chastised plaintiff for his insubordination in "going outside the chain of command." *Id.* at 1419. Subsequently, the supervisor issued written reprimands to plaintiff and assigned some of his duties to another employee. *Id.*

Focusing on whether plaintiff's supervisor, now a defendant in plaintiff's retaliation claim, enjoyed qualified immunity from the claim, the panel emphasized the tremendous obstacle that the qualified immunity doctrine presents to any litigant asserting a First Amendment retaliation claim. Specifically, the panel noted that because both prongs of the *Pickering-Connick* balancing test "involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, *it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors* that inform an application of the *Pickering-Connick* test." *Id.* at 1420 (citations omitted) (emphasis added). "Consequently, *a defendant* in a First Amendment suit *will only rarely be on notice*, that his actions are unlawful." *Id.* (emphasis added). The panel then repeated the familiar requirement for a plaintiff facing a qualified immunity defense: "Unless the plaintiff can either produce a case in which speech materially similar to his in all *Pickering-Connick* respects was held protected . . . or show that, on the facts of his case, no reasonable person could believe that both prongs of the test had *not* been met, he

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[4] The opinion does not make clear when the protected speech occurred, but a reading of the factual discussion suggests that the plaintiff's complaints occurred in 1994, or thereafter.

cannot defeat a defense of qualified immunity." *Id.* (internal citation omitted) (emphasis in original).

Having articulated the above stringent requirements, the panel concluded that plaintiff Martin had failed to show a sufficiently similar case: "[plaintiff] points to no case, *and we find none after our own search*, that would have made it obvious to a person in [defendant's] position that [plaintiff's] speech . . . was constitutionally protected." *Id.* at 1421 (emphasis added). The panel in *Martin* did not reach the merits of the case, however: that is, was Martin's speech constitutionally protected? Instead, the panel only decided that the defendants would not have been on notice that the speech was, in fact, protected. The Eleventh Circuit decided *Martin* on April 28, 1998. Thus, as this was the court's last word on the subject plaintiffs in this this case held their meeting with Commissioner Darnell on August 27, 1998, defendants argue that qualified immunity attaches to them. Plaintiffs, not surprisingly, contend that *Walker*, the earlier case, controls.

This Court dealt with the confusion created by the interplay between *Walker* and *Martin* in its previous Order [43] at 32-38. Plaintiffs correctly argue that *Martin* essentially punted on the merits of the dispute—whether complaints to an outside political official about irregularities in the agency's bidding process constituted speech on a matter of public concern—and ruled only that the defendant in *Martin* would not have been on notice that such complaints satisfy the first two prongs of the *Pickering* balancing test. Accordingly, plaintiffs continue, *Walker*, which did not abstain from a decision on the merits, controls, and this case arguably should have put the defendants on notice that plaintiffs' speech was protected. Plaintiffs make a good argument, to a point. The problem with the argument, however, is that the *Martin* panel, looking at speech that was almost identical to the speech in

this case,[5] stated emphatically that the panel had searched and found *no case* that would have provided ample notice to a government employer that the speech in question would have been Constitutionally protected.[6] Translated into immunity language, the panel informed all potential First Amendment defendants that there was no case on the Eleventh Circuit's books prior to April 28, 1998, the date of the decision, to signal to a potential defendant that he would not be protected by qualified immunity in the circumstances found in the *Martin* case, which are the same circumstances found in the present case before this Court. As the Court noted in its previous Order, this statement could have meant either that the *Martin* panel was unaware of the *Walker* decision or that it was aware, but found the facts of that case too dissimilar to the facts before it, which are similar to the facts before this Court, to constitute notice. If the second, clearly *Martin* erases any notice that *Walker* may have provided to the defendants. If the first—that the *Martin* panel had simply missed the *Walker* decision in their research—still it seems unreasonable to expect a governmental supervisor to be on notice that an Eleventh Circuit opinion is wrong, such that

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[5] The speech was not identical because plaintiffs, here, also apparently spent a substantial part of their conversation with Commissioner Darnell discussing matters clearly of a personal, not public concern. This dissimilarity, however, is not helpful to plaintiffs' cause.

[6] Plaintiffs also argue that, as a result of the Supreme Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), the *Martin* case was wrongly decided. (Pls.' Br. [48] at 7.) Whether or not *Martin* has continuing viability since the 2002 *Hope* decision, however, cannot impact this Court's determination of what notice *Martin* imparted to the defendants here in 1998-99, when the alleged retaliatory acts occurred. The defendants were not on notice in 1998-99 of a decision that was then but a twinkle in the eyes of the Supreme Court, and they could not be expected to know that the qualified immunity defense might arguably be narrowed by the as-yet unannounced *Hope* decision.

this potential defendant should then be expected to go behind that decision to find earlier cases that contradict it.[7]

This Court lacks the power to unscramble this confusion. As indicated in the first Order, the Court will assume, with much uncertainty, that the defendants were on notice that whistle-blowing complaints to a Government official about irregularities in the County's bidding process constitute speech concerning a matter of public importance. Indeed, such types of complaints about such important matters arguably go to the heart of the type of speech intended to be protected by the First Amendment. Even ignoring *Martin*, and assuming that *Walker* placed defendants on notice of the protection accorded whistle-blower activity concerning matters of public interest, another obstacle arises for plaintiffs. Specifically, the facts in *Walker* differ from those in the instant case. Namely, in *Walker*, the plaintiff apparently spoke out only on issues that impacted the public interest, and did not air any concerns about his own working conditions. In the present case, the plaintiffs admittedly discussed with Commissioner Darnell, along with their complaints about alleged bidding irregularities, numerous personal matters that clearly would not trigger public concern. (*See* Order [43] at 17-18.) Although this Court assumed, in its earlier Order, that it would ultimately conclude that plaintiffs had spoken out on an issue of public concern, notwithstanding the numerous

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[7] There is also a third possible explanation for the *Martin* panel's statement that no prior cases existed to put the *Martin* defendants on notice that the speech was protected. Specifically, the retaliatory acts by the *Martin* defendants appear to have taken place in 1994-95. *Martin*, 141 F.3d at 1419. As *Walker* was not published until 1997, it is possible that the panel could have meant that the *Martin* defendants could not have been aware of a decision released two years later.

Yet, this is not at all what the panel said—they said that no case existed—and it seems more than a stretch to attribute this thought process to the panel. Moreover, again, a potential defendant reading *Martin* would not be aware of this undisclosed, *post-hoc* rationale for the opinion.

personal matters identified in their meeting with Darnell, (*see id.* at 16-18), the possibility that the Court will eventually agree with plaintiffs on this point, after a trial,[8] does not mean that the defendants would have necessarily been on notice that mixed-speech consisting of both personal and public complaints constituted protected speech. Similarly, the presence of this mixed-speech complicates an analysis of the conclusions that can be properly attributable to defendants on the second prong of the balancing test: the Government's need to discipline insubordinate employees weighed against the importance of the employee's speech.

Indeed, a reading of the deposition transcript of Commissioner Darnell, which was not filed with this Court during the previous round of briefing, lends great support to the defendants' argument. Darnell described the August 27, 1998, meeting with the plaintiffs as follows:

> The employees were extremely, I would use the word upset, and deeply concerned about what they had been told regarding a reorganization in the Purchasing Department. They felt that if the reorganization occurred in the way in which it had been presented to them, then it

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[8] Here, defendants hotly dispute that the thrust of the plaintiffs' comments to Commissioner Darnell concerned bidding irregularities, which complaint the defendants characterize as a small part of the presentation to the commissioner. (*See* Gates' Br. [55] at 20.) The question whether the purpose behind a plaintiff's speech was to raise issues of public concern, or to further private interest is a question of law for the Court, not a question of fact. *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1297 (11th Cir. 1998) (citation omitted). Nevertheless, in making this legal assessment, the Court must necessarily examine a set of facts: specifically, the particular speech at issue. Where there is a factual dispute as to whether certain speech was uttered, the Court assumes, but is not certain as so few First Amendment cases survive summary judgment motions, that the jury would have to make the factual determination whether the speech was actually uttered.

> would have an adverse impact upon their job status. That their jobs would be abolished and that they would have some kind of reduction in their job status. They were also very concerned and talked to me at length during that meeting about what they considered to be disrespectful and they felt discriminatory with respect to gender conduct and behavior by the department head. They also gave several instances during department meetings and, you know, other kinds of incidents describing what Mr. Gates said, what he did, so on. I don't remember the details, but they felt that he had been extremely abusive and disrespectful to them. They also were concerned that, with respect to the reorganization that the efficiency of the department would be compromised if the reorganization occurred.

(Darnell Dep. [49] at 10-11.) Plaintiffs' counsel asked Darnell, "at the August 27th meeting it's your testimony that there was nothing with respect to procurement issues or bid irregularities raised; is that correct?" (*Id.* at 24.) Darnell responded, "That's correct. A lot of discussion, over an hour, about Mr. Gates and the work environment." (*Id.*) Darnell subsequently emphasized that she was "absolutely perplexed as to why [plaintiffs] would say they met with me on bid irregularities when they know I know they met with me about their work situation, because they were extremely upset about it." (*Id.* at 40.)

That Commissioner Darnell testified as described above does not mean that the Court or a jury must accept her testimony. Her recollection could have been faulty or, as an employee of the entity being sued, she could be impeached for bias. A reading of her testimony, however, has prompted the Court to conclude that the characterization of the plaintiffs' speech is a far more troublesome issue than the Court had realized from the earlier briefing in the case. In examining this question, the Court is mindful that an employee's

speech will rarely be entirely private or entirely public, and so the "main thrust" of the employee's speech must be determined. *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1289 n.13 (11th Cir. 2000) (citing *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993)). One makes this determination by examining the content, form, and context of a given statement, as revealed by the whole record. *Id.* (citations omitted). Further, the extent of a dispute over the characterization of a plaintiff's speech can be pivotal in determining whether a defendant's alleged actions can be said to violate *clearly established* First Amendment rights. That is, if it is unclear whether a plaintiff's complaints were of the kind to involve a matter of public concern, then the defendant will be entitled to qualified immunity. *Badia v. City of Miami*, 133 F.3d 1443, 1445 (11th Cir. 1998) (citations omitted). That is, expression of personal dissatisfaction within an otherwise protected speech context may remove cases from "inevitable" status under the *Pickering* balance. *Cooper v. Smith*, 89 F.3d 761, 766 (11th Cir. 1996) (citing *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989) and *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994)).

At the outset, it is difficult for the Court to judge whether the thrust of the plaintiffs' speech was personal in nature or pertained to matters of public concern. Evidence supporting the defendants, in the form of Commissioner Darnell's testimony, suggests that most of the plaintiffs' complaints pertained to personal matters, not issues that would concern the public. In opposing defendants' motions for summary judgment, the plaintiffs submitted affidavits that spelled out the bid irregularities that they discussed with the Commissioner. Yet, nowhere in these affidavits do plaintiffs indicate what portion of their conversation with Commissioner Darnell was occupied with these concerns and whether or not the bid irregularities represented a small part of their conversation. (*See* Pls.' Consolidated Br. in Opp'n to Defs.' Mots. for Summ. J. [35] at Exs. A, B, C.) Given that the plaintiffs were

necessarily aware of Darnell's testimony when they provided their affidavits, the Court finds this omission to be striking.[9] At any rate, plaintiffs' failure to contravene this argument by defendants on this second round of briefing, suggests that they agree with the characterization of the conversation. Accordingly, the undisputed evidence indicates that the majority of plaintiffs' conversation with Commissioner Darnell pertained to personal matters.

Given the above conclusion, plaintiffs were obliged to produce case law that would indicate that when a public employee speaks on a jumble of personal and public issues, with the personal issues predominating, her supervisor would necessarily know that this speech constituted protected speech under the *Pickering-Connick* test. Plaintiffs have failed to do so. Moreover, although the Court has not thoroughly researched this question, as it is not its job to do so, it has, in the course of its general research, found a case that suggests that qualified immunity would be appropriate in such a case. Specifically, in *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1298 (11th Cir. 1998), the panel concluded that "due to the unique confluence of facts" in which an employee's letter focused on both matters of public interest and personal matters only of interest to the plaintiff, a reasonable official would not have been compelled to believe that the letter constituted speech on a matter of public concern.

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[9] Each plaintiff's affidavit does list a number of specific bid files and procedures which plaintiffs found to be matters of concern and which they allegedly discussed with Darnell. (*See, e.g.*, Aff. of Debra Blount at ¶¶ 7-12, attach. to Pls.' Consolidated Br. in Opp'n to Defs.' Mots. for Summ. J. [35] at Ex. A.) Still, though plaintiffs give some of the specifics of what was allegedly discussed, they do not indicate what portion of their conversation with Darnell was occupied with these issues. As noted above, according to Darnell, the discussion of Gates and plaintiffs' work environment lasted more than an hour. (Darnell Dep. [49] at 24.)

Accordingly, the Court concludes that plaintiffs have failed to defeat the defendants' defense of qualified immunity, and the Court's previous decision should not be reconsidered. Even if the plaintiffs had demonstrated that qualified immunity was inappropriate as to the question whether speech was protected, as discussed in the next section, the Court also concludes that they have still failed, for the most part, to demonstrate that a reasonable official would necessarily have known that the actions defendants took against plaintiffs constituted adverse actions.

**II.** ***Alleged Retaliatory Acts by Defendants***

**A. Constructive Discharge**

As noted *supra*, in its earlier Order, the Court had indicated its uncertainty as to the retaliatory acts that the plaintiffs were relying on for their constructive discharge argument. The Court invited plaintiffs to brief this matter; they have done so. To prevail on the merits, plaintiffs must demonstrate that these acts, taken collectively, constituted a constructive discharge. To succeed on their claims, however, plaintiffs must show more than just a winning claim on the merits. Specifically, plaintiffs must demonstrate that these retaliatory acts were sufficiently severe to have put the defendants on notice that they had constructively discharged the plaintiffs. Otherwise, the defendants will prevail under a qualified immunity defense. The Court concludes that plaintiffs have failed to defeat defendants' qualified immunity defense.

Addressing the merits of the claim first, a plaintiff can prove constructive discharge only by showing that her working conditions were so difficult or intolerable that a reasonable person in her position would have felt compelled to resign. *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1160 n.30 (11th Cir. 2002) (citing *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997)

(citing *Thomas v. Dillard Dep't Stores, Inc.*, 116 F.3d 1432, 1433-34 (11th Cir. 1997), *cert. denied*, 512 U.S. 1221 (1994)). As noted above, plaintiffs have conceded that "the actions of Reynolds, taken separate and apart from the actions of Gates, do not give rise to a claim for constructive discharge against her individually." (Pls.' Br. in Supp. of Pls.' Mot. for Reconsideration (hereinafter, "Pls.' Br.") [48] at 29 n.3.) Thus, plaintiffs have essentially abandoned a constructive discharge claim as to defendant Reynolds, but continue to press this claim against defendant Gates. The Court will therefore address those alleged retaliatory actions on the part of defendant Gates that plaintiffs claim amount to constructive discharge.

Plaintiffs allege that Gates ostracized them from the office, prohibited other employees from communicating with them, and interrogated those employees who did try to communicate with them. (*See* Pls.' Revised Statement of Material Facts Showing Genuine Issues to be Tried as to the Actions Taken Against Each Plaintiff by Each Defendant (hereinafter, "Pls.' Revised SMF") [48] at ¶¶ 6, 28, 42.) They further argue that Gates forced all of the plaintiffs to display their time sheets in a public area for everyone to see, while all other employees were allowed to keep their time sheets in private areas. (*Id.* at ¶¶ 15, 35, 47.)

On October 8, 1998, Gates also allegedly asked all of the plaintiffs to turn over their bid files, leaving them with absolutely no work to do. (*Id.* at ¶¶ 12, 33, 45.) Gates also stopped allowing the plaintiffs to attend Board of Commissioners meetings, which they had all attended in the past as part of their job responsibilities. (*Id.* at ¶¶ 10, 32, 44.) Gates excluded plaintiff Akins from attending a year-end closeout with the Finance and Information Technology ("IT") departments, a process Akins had been involved with throughout her career at Fulton County, and he also refused to let her attend Steering Committee meetings with IT and

Finance that she had previously attended. (*Id.* at ¶ 8.) Finally, after the plaintiffs had been left with no work to do for about a month and a half, Akins complained to the Fulton County Personnel Director, and some, but not all, of the plaintiffs' previous files and duties were returned to them. (*Id.* at ¶ 13.) Gates then began to allow Akins to attend certain bid selection committee meetings again, but he required her to have another person attend these meetings with her. (*Id.*) Finally, when Akins conducted plaintiff Blount's exit conference, Akins noted that Blount stated that she was leaving due to the bidding and award irregularities and subsequent retaliation for reporting such irregularities. (*Id.* at ¶ 20.) Gates allegedly threatened Akins to attempt to get her to change her notes on the conference, but she refused; Gates subsequently lowered her performance rating from "exceeds expectations" to "meets expectations." *(Id.)* The plaintiffs suffered no diminution of pay or job titles, however.

Plaintiffs argue that clearly established law gave defendants fair warning that their conduct constituted constructive discharge, and therefore qualified immunity is inappropriate.[10] (Pls.' Br. [48] at 29.) Plaintiffs rely on *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551 (11th Cir. 1997). In *Poole*, the plaintiff alleged that the defendants impermissibly discriminated against her because of her age, retaliated against her for engaging in statutorily protected activity, and constructively discharged her. *Id.* at 551. Plaintiff, who served as secretary to the defendant country club's general manager, was told that her duties and responsibilities would be reduced to "virtually nothing." *Id.* at 551-52. Plaintiff had given an unsworn statement in support of six former employees who were suing the defendants for age discrimination, and four days later, the general manager sent a security guard to plaintiff's house in the middle of the night

[10] *See* discussion of qualified immunity in the Court's earlier Order [43] at 23-28.

to retrieve her key to his office. *Id.* at 552. When plaintiff returned to work from a five-day medical vacation due to a stress disorder from which she suffered, she was not allowed to use her desk or computer. *Id.* The general manager informed her that she was being relieved of all her existing responsibilities and that she was being transferred to the business office, but that her pay and benefits would not decrease. *Id.* Plaintiff alleged that the defendant instructed other employees not to speak to her and that once in the business office she was given only a chair with no desk and had to keep her belongings next to her chair in boxes. *Id.* As plaintiff had no duties or responsibilities, she spent only a few days in her new job before resigning. *Id.*

The Eleventh Circuit held that, "[s]tripped of all responsibility, given only a chair and no desk, and isolated from conversations with other workers, [plaintiff] has presented evidence suggesting that a reasonable person might find the conditions under which she was working intolerable." *Id.* at 553. Consequently, viewing the evidence in the light most favorable to the plaintiff, the panel held that genuine issues of material fact existed as to whether plaintiff was constructively discharged from the country club. *Id.* The panel stated that "reasonable jurors exercising impartial judgment might reach different conclusions as to whether [plaintiff] was constructively discharged," and it therefore reversed the district court's grant of summary judgment for the defendants. *Id.*

Defendant Gates argues that since the Eleventh Circuit only decided that the plaintiff in *Poole* presented sufficient evidence to create a genuine issue of material fact as to whether she was constructively discharged, and not whether the acts actually constituted a constructive discharge, *Poole* could not give him fair warning. (Gates' Br. [55] at 17.) The Court agrees. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was

unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A holding by the Eleventh Circuit that a particular set of facts merely raised a question of material fact sufficient to preclude summary judgment would not make it clear to a reasonable officer that his conduct was necessarily unlawful in the situation that he confronted. Thus, the reversal of summary judgment in *Poole* did not clearly establish that those facts alleged in that case constituted a constructive discharge, but instead indicated only that reasonable jurors exercising their impartial judgment on the question might or might not agree that these acts constituted constructive discharge.

Indeed, the test for a constructive discharge—whether a reasonable person would have felt that his working conditions were intolerable—is so general and fact-specific that it would be difficult for a plaintiff ever to defeat qualified immunity on such a claim.[11] As plaintiffs have pointed to no case that would have put Gates on notice that his actions were clearly unlawful, summary judgment based on qualified immunity is

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[11] That an employee might have an uphill struggle against a supervisor on a constructive discharge claim does not mean that the employee is without any recourse. As noted in the Court's earlier Order ([43] at 43-46), plaintiffs could have filed a grievance with the County's Personnel Board as to Gates' conduct toward them. Had the County denied their grievance or refused to ameliorate the conditions of their jobs, this would have constituted the final action of a decision-maker, which action the plaintiff could have used as a basis for asserting a claim of retaliation in this Court. As the County, itself, not an individual supervisor, would have been the defendant in such an action, there would have been no qualified immunity defense for plaintiffs to overcome.

appropriate as to the constructive discharge claim against defendant Gates.[12]

### B. Adverse Acts That Fall Short of a Constructive Discharge

Apparently aware that their constructive discharge fails on qualified immunity grounds, plaintiffs argue that their retaliation claims do not hinge on the success of a claim that they were constructively discharged. (Pls.' Br. [48] at 16.) According to plaintiffs, contrary to this Court's reading of their Complaint as alleging only a constructive discharge, the recitation of these myriad retaliatory acts by the defendants means that the plaintiffs can proceed on these acts, alone, even if these acts, together, do not constitute a constructive discharge. (*Id.*)[13] Plaintiffs further assert that the law clearly

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[12] Gates also argues that he is entitled to summary judgment on the constructive discharge claims of plaintiffs Akins and Revell because both transferred to other positions within Fulton County government and suffered no loss of pay or benefits. (Gates' Br. [55] at 18.) Requiring a transfer can be a constructive discharge. *Maddow v. Procter & Gamble Co., Inc.*, 107 F.3d 846, 852 (11th Cir. 1997) (citation omitted). A transfer to a different position can be "adverse" if it involves a reduction in pay, prestige, or responsibility. *Hinson v. Clinch County, Georgia Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000) (citation omitted). Akins alleges that she transferred to a position in which she was put in a basement and assigned to do work for which she was not qualified. (Pls.' Revised SMF [48] at ¶ 3.) Revell alleges she felt compelled to transfer to a position that gave her no possibility of promotion. (*Id.* at ¶ 40.) It seems, then, that Akins's transfer might be considered a constructive discharge due to her loss of responsibility and Revell's transfer might arguably be deemed a constructive discharge due to a loss of prestige. As Gates was not given fair notice that his actions could be considered a constructive discharge, this is a moot point, however.

[13] Plaintiffs cite the Court to the second paragraph of their Complaint, which alleged that plaintiffs were subjected to retaliation including unjustified work performance warnings, the threat of suspension without pay, the threat of job loss through dissolving the Contracting Division, exclusion from meetings, and directives to plaintiffs not to perform certain

established, as of August 1998, that retaliatory actions that fall short of a constructive discharge are actionable when taken against individuals who speak out on matters of public concern. (*Id.* at 17.) Defendants, not surprisingly, disagree that the law clearly established that the actions taken against plaintiffs constituted retaliation under First Amendment law.

### C. Legal Standard Regarding Adverse Employment Actions

"For a public employee to establish that an employment action has infringed a constitutional right the employee also must demonstrate that he or she has suffered some sort of adverse employment action for exercising the right." *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). Government employees are protected not only from discharge for exercising their First Amendment right to free speech, but also from any adverse employment action that is likely to chill the exercise of constitutionally protected speech. *Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992) (citing *McGill v. Board of Educ.*, 602 F.2d 774, 780 (7th Cir. 1979)). "'Adverse employment action' is broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands." *McCabe*, 12 F.3d at 1563 (citations and internal punctuation omitted). "An adverse employment action is an ultimate employment decision, such as a discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000) (citation and internal punctuation omitted). Conduct that falls short of an ultimate employment decision must meet "some

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work followed by discipline imposed upon them for not performing it. (*Id.*)

threshold level of substantiality" to be cognizable. *Id.* (citing *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998)). The employee must show *serious and material* change in the terms, conditions, or privileges of his employment. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001). There is no bright-line test for what kind of effect on the plaintiff's terms, conditions, or privileges of employment is serious enough to be actionable, and no rigid test would be proper. *Id.* at 1238.

Furthermore, the employee's subjective view of the significance and adversity of the action is not controlling; the employment action must be adverse from the viewpoint of a reasonable person under the circumstances. *Id.* Whether an action is adverse for purposes of a retaliation claim must be determined on a case-by-case basis. *Gupta*, 212 F.3d at 587 (citing *Doe v. DeKalb County Sch. Dist.*, 145 F.3d 1441, 1448-49 (11th Cir. 1998)).

Plaintiffs argue that the Supreme Court, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), lowered the threshold for what constitutes an adverse employment action in First Amendment retaliation cases. (Pls.' Br. [48] at 19.) In that case, the Court held that "promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." *Rutan*, 497 U.S. at 75. The Court rejected the position that only those employment decisions that are the "'substantial equivalent of a dismissal'" violate a public employee's rights under the First Amendment as unduly restrictive. *Id.* The Court emphasized, however, that the "First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge." *Id.* at 76. Plaintiffs focus on the Court's remark in a footnote that the First Amendment "protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a

public employee . . . when intended to punish her for exercising her free speech rights.'" *Id.* at 76 n.8 (citation omitted). Plaintiffs thus assert that the bar for asserting a First Amendment retaliation claim is lower than that to assert some other type of retaliation claim.

Defendants respond that this sentence from *Rutan* is mere dictum and has not served to lower the standard for showing retaliation in First Amendment cases. (Gates' Br. [55] at 5; Reynolds' Br. [54] at 17-18.) Courts have disagreed on the proper application of this part of *Rutan*.[14] Since the parties filed their briefs, the Eleventh Circuit has issued a decision, *Stavropoulos v. Firestone*, No. 02-16486, 2004 WL 345864 (11th Cir. Feb. 25, 2004), that addresses this matter. In that case, the plaintiff, an untenured assistant professor in the School of Art at the University of Georgia, brought a First Amendment retaliation claim against the Director of the School of Art and the chairman of her tenure review committee, alleging that they retaliated against her for assisting a rejected female applicant who had claimed gender discrimination. *Id.*, at *4. Plaintiff cited a litany of harassing acts by the defendants and argued that the First Amendment imposes a much more liberal standard than does Title VII in determining whether an employment action is adverse; namely, plaintiff asserted that any action likely to chill an employee's exercise of constitutionally protected speech satisfies the adverse employment action requirement. *Id.*, at *7. The Eleventh Circuit panel rejected this standard as

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[14] *Compare Pierce v. Texas Dep't of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994) (holding that as footnote 8 is inconsistent with the body of the *Rutan* opinion, the court would not read this bit of Supreme Curt dicta literally but would instead apply "the main analysis of *Rutan* to retaliation claims and require more than a trivial act to establish constitutional harm") *with Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (applying footnote 8 of *Rutan* as the standard for actionable harm in First Amendment retaliation claims).

contrary to circuit precedent. *Id.* Moreover, the court explicitly rejected footnote 8 of the *Rutan* opinion as dicta and inconsistent with circuit law. *Id.*, at *10 n.8. The court reaffirmed that "[t]o be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment." *Id.*, at *7 (citing *Bickel v. Burkhart*, 632 F.2d 1251, 1255 n.6 (5th Cit. Unit A 1980)). Acts involving important conditions of employment include discharges, demotions, refusals to hire or promote, and reprimands. *Id.* The panel also noted that it regularly uses Title VII adverse employment action cases in First Amendment retaliation analysis "because the standards are consonant." *Id.* In the First Amendment context, allegations of a subjective chill on speech are not enough to constitute an adverse act; plaintiff must show that the action had an impact on an important aspect of her employment. *Id.*, at *8.

Turning to plaintiff's specific allegations, the panel concluded that neither of the defendants inflicted an adverse employment action on plaintiff because none of their actions[15] affected an important condition condition of employment. *Id.*, at *9, In sum, the court held that defendants' actions did not violate plaintiff's First Amendment rights, but even had it found a violation, the court concluded that it found that the case law in this area did not put defendants on notice that their actions were unlawful. Accordingly, the defendants would be shielded by qualified immunity. *Id.*

Applying *Stavropoulos* here, in order to show an adverse employment action in a First Amendment retaliation case, a plaintiff must point to actions involving important conditions

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[15] These acts included a critical memo, the assembling of letters documenting plaintiff's unprofessional conduct, a negative performance evaluation, and encouraging faculty members to say critical things to plaintiff's tenure review committee. *Id.* at *9.

of employment, such as discharges, demotions, refusals to hire or promote, reprimands, salary, title, or job duties. *Id.*, at *7, 9. An employment action is adverse only if it results in "some tangible, negative effect on the plaintiff's employment" that would be considered a "*serious and material* change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances." *Shotz v. City of Plantation, Florida*, 344 F.3d 1161, 1181-82 (11th Cir. 2003) (citation omitted) (emphasis in original).

**D. Alleged Adverse Employment Actions**

Plaintiffs in the case at hand have detailed a laundry list of complaints that they allege comprise adverse employment action against both defendants. (*See generally* Pls.' Revised SMF [48].) Plaintiffs address only the alleged adverse actions by defendant Reynolds in their brief, however, because they assert that "it should be clear" that Gates's harassment was adverse and this Court's previous Order [43] seemed to call into question only whether Reynolds's conduct rose to that level. (Pls.' Br. [48] at 22-23.) As Gates points out, this approach presents some difficulty for both Gates and this Court, because the plaintiffs did not follow the Court's instruction to demonstrate that clearly established law would have alerted a reasonable official that the alleged acts were sufficient to constitute constructive discharge (or, as plaintiffs now argue, retaliatory harassment). The Court will not repeat and address all fifty-one paragraphs of the plaintiffs' revised statement of material facts. Instead, the Court will focus its attention only on those allegations that arguably constitute adverse employment actions under the governing law of this circuit.

First, plaintiffs allege that they were given a series of reprimands by defendants Gates and Reynolds. Defendant Gates repeatedly reprimanded plaintiff Akins for permitting Blount and Revell, her subordinates, to report the irregularities in the bidding process. (Pls.' Revised SMF at ¶ 7.) Plaintiffs

Blount and Revell each allege that on August 27, 1998, Gates gave them unfounded disciplinary notices for eavesdropping, solely to retaliate against them. (*Id.* at ¶¶ 27, 41.) Akins alleges that on November 2, 1998, Reynolds gave her an unfounded disciplinary letter for insubordination in order to retaliate for plaintiffs' meeting earlier that day with the county personnel director. (*Id.* at ¶ 22.) Plaintiff Blount avers that in October of 1998 she referred a call to Reynolds that she had received from a vendor who was requesting information pertaining to a bid. (*Id.* at ¶ 34.) Blount transferred the call to Reynolds, who was unwilling to deal with the vendor. (*Id.*) Reynolds then approached Blount in her office, reprimanded her, and slammed her door without allowing Blount a chance to explain that she had transferred the call to Reynolds because Gates had reassigned this work to Reynolds from the plaintiffs. (*Id.*) Because of this incident, Blount was accused of sabotage, not working, giving out erroneous information, and passing calls around. (*Id.*) Reynolds orally reprimanded Blount for passing phone calls. (*Id.* at ¶ 37.)

A reprimand is an adverse employment action. *Stavropoulos*, 2004 WL 345864, at *7 (citation omitted); *McCabe*, 12 F.3d at 1563 (citation omitted). Typically, a reprimand means something written that could be placed in an employee's file and that becomes part of the employee's disciplinary record for the future. Mere oral criticism should not typically be construed as a reprimand because such conduct has no permanent consequences and would encompass many daily interactions in the workplace in which a supervisor attempts to correct an employee.[16] An employment action is adverse only if it results in "some tangible, negative effect on the plaintiff's employment" that would be considered a "*serious*

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[16] It is clear that "not all conduct by an employer negatively affecting an employee constitutes adverse employment action." *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1238 (11th Cir. 2001) (citations omitted).

*and material* change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances." *Shotz*, 344 F.3d at 1181-82. Such ordinary, every-day criticism does not meet this definition of adverse action. *Gupta*, 212 F.3d at 588; *see also Fitz v. Pugmire Lincoln-Mercury, Inc.*, 348 F.3d 974, 977 (11th Cir. 2003) (holding that a reprimand "which has yielded no adverse consequences is not a 'working condition' *at all*"). Of the "reprimands" listed above, then, the verbal criticisms do not qualify as adverse actions. The only reprimands that the Court finds to be potentially adverse employment actions for purposes of First Amendment retaliation analysis are the written disciplinary notices given Blount and Revell on August 27, 1998, by Gates, allegedly for eavesdropping and the allegedly unfounded disciplinary letter given by Reynolds to Akins on November 2, 1998, for insubordination allegedly done in order to retaliate for plaintiffs' meeting earlier that day with the county personnel director.

Second, as noted above, all the plaintiffs allege that defendant Gates isolated them and took away their job duties for a period of time. Plaintiffs allege that Gates ostracized them from the office, prohibited other employees from communicating with them, and interrogated those employees who did try to communicate with them. (Pls.' Revised SMF at. ¶¶ 6, 28, 42.) On October 8, 1998, Gates allegedly asked all of the plaintiffs to turn over their bid files, leaving them with absolutely no work to do. (*Id.* at ¶¶ 12, 33, 45.) Gates also stopped allowing the plaintiffs to attend Board of Commissioners meetings, which they had all attended in the past as part of their job responsibilities. (*Id.* at ¶¶ 10, 32, 44.) Gates excluded plaintiff Akins from attending a year-end closeout with the Finance and Information Technology ("IT") departments, a process Akins had been involved with throughout her career at Fulton County, and he also refused to let her attend Steering Committee meetings with IT and Finance that she had previously attended. (*Id.* at ¶ 8.) The

plaintiffs' positions were essentially eliminated. (Aff. of Debra Blount at ¶ 33, attach. to Pls' Consolidated Br. in Opp'n to Defs.' Mots. for Summ. J. [35] at Ex A; Aff. of Janice Akins at ¶ 32, attach. to Pls' Consolidated Br, in Opp'n to Defs.' Mots. for Summ. J. [35] at Ex. B; Aff. of Natalie Revell at ¶ 30, attach. to Pls' Consolidated Br. in Opp'n to Defs.' Mots. for Summ. J. [35] at Ex. C.) Plaintiffs continuously attempted to find work to fill their time, but they were unable to do so due to Gates's instructions to the rest of the office to ignore them. (*Id.*) Finally, after the plaintiffs had been left with no work to do for about a month and a half, Akins complained to the Fulton County Personnel Director, and some, but not all, of the plaintiffs' previous files and duties were returned to them. (Pls.' Revised SMF at ¶ 13.) Gates then began to allow the plaintiffs to attend certain bid selection committee meetings again, but he required them to have another person attend these meetings with them. (Aff. of Debra Blount at ¶ 34, attach. to Pls' Consolidated Br. in Opp'n to Defs.' Mots. for Summ. J. [35] at Ex. A; Aff. of Janice Akins at ¶ 33, attach. to Pls' Consolidated Br. in Opp'n to Defs.' Mots. for Summ. J. [35] at Ex. B; Aff. of Natalie Revell at ¶ 31, attach. to Pls' Consolidated Br. in Opp'n to Defs.' Mots. for Summ. J. [35] at Ex. C.)

To be considered an adverse employment action, the complained of action must involve an important condition of employment. *Stavropoulos*, 2004 WL 345864, at *7 (citation omitted). Job duties constitute an important condition of employment. *Id.* at *9. Therefore, the removal of all of plaintiffs' job duties for the period of a month and a half could arguably be considered an adverse employment action. *Id.* at *8. Though most of plaintiffs' duties were eventually returned to them, Gates's action had an impact on an important aspect of their employment. *Id.* "A proposed action that is corrected as soon as the proper official is made aware of it and before it goes into effect, so that the employee does

not actually suffer any consequence, is not 'adverse.'" *Gupta*, 212 F.3d at 588. Here, the action of removal of plaintiffs' duties actually went into effect, and the plaintiffs suffered short term consequences because of it, so the action still presumably qualifies as an adverse one, even though plaintiffs eventually did get most of their job duties back after a month and a half without them.

Third, plaintiff Akins alleges that when she conducted Blount's exit conference, Akins noted that Blount stated that she was leaving due to the bidding and award irregularities and subsequent retaliation for reporting such irregularities. (Pls.' Revised SMF at ¶ 20.) Gates allegedly threatened Akins to attempt to get her to change her notes on the conference, but she refused; Gates subsequently lowered her performance rating from "exceeds expectations" to "meets expectations." (*Id.*) A negative performance evaluation, standing alone, does not constitute an adverse employment action. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001) (citation omitted).[17] "An employment action is considered 'adverse' only if it results in some tangible, negative effect on the plaintiff's employment." *Id.* Here, plaintiff Akins has alleged no such tangible effect from this performance evaluation, so it does not constitute an adverse employment action.

Finally, plaintiffs allege a mishmash of other actions taken by defendants Gates and Reynolds which plaintiffs claim to have been adverse employment actions. None of these actions meet the standard for an adverse action, however. On Janu-

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[17] *Grainger* is a retaliation case brought under the ADA. The standard for proving retaliation under the ADA is the same as the standard for showing retaliation under Title VII. *See Weeks v. Harden Mfg. Co.*, 291 F.3d 1307, 1311 (11th Cir. 2002) (citation omitted). As noted above, the standards for showing retaliation under Title VII and the First Amendment are consonant. *Stavropoulos*, 2004 WL 345864, at *7 (citations omitted).

ary 7, 1999, Akins received a memorandum from Gates threatening to suspend her for insubordination. (Pls.' Revised SMF at ¶ 18.) This accusation stemmed from Gates ordering Akins to train staff members on a new computer system; Akins stated that she could not perform this training because she had not been trained on the system herself, which Gates knew when he asked her to perform the task. On January 12, 1999, Gates gave her an identical memorandum again accusing her of insubordination and threatening to suspend her. (*Id.* at ¶ 19.) Threatened actions never taken do not constitute adverse employment actions. *See Gupta*, 212 F.3d at 588 n.15. Therefore, the threat of suspension cannot be considered an adverse employment action. Moreover, as Akins does not allege that these letters had any actual effect on her, they probably cannot be considered adverse actions. *Id.*

Akins alleges that Reynolds solicited a memorandum by another employee that falsely accused Akins of bad conduct and complained of innocuous statements she had supposedly made in a loud tone. This action did not have some "tangible, negative effect on the plaintiff's employment" that would be considered a "*serious and material* change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances." *Shotz*, 344 F.3d at 1181-82. Finally, Akins also alleges that on December 4, 1998, Reynolds stopped her at the main entrance to the office and stated, "For your information, I graduated from high school in 1973 at Douglas." (Pls.' Revised SMF at ¶ 24.) Reynolds then followed Akins into her office and stated, "Putting all friendships aside, you had better not ever put my name in your mouth again." Reynolds then took a threatening posture, and Akins felt physically intimidated by her. (*Id.*) At best, this allegation represents a petty personal dispute and is also not an adverse employment action.

Finally, plaintiff Revell asserts that on November 11, 1998, in a department meeting, Gates made a statement that there

were three employees (presumably, the plaintiffs) who should just leave. (*Id.* at ¶ 51.) Reynolds allegedly concurred with this statement and stated that if the three were so unhappy that they should just leave. (*Id.*) This comment may not show good workplace decorum, but it did not have some "tangible, negative effect on the plaintiff's employment" that would be considered a "*serious and material* change in the terms, conditions, or privileges of employment . . . as viewed by a reasonable person in the circumstances." *Shotz*, 344 F.3d at 1181-82.

In sum, plaintiffs have alleged two adverse employment actions on the part of defendant Gates. First, plaintiffs Blount and Revell allege that Gates gave them unfounded disciplinary reprimands on August 27, 1998. Second, all plaintiffs have alleged that Gates isolated them and removed all of their job duties for a period of a month and a half. The only adverse employment action alleged against defendant Reynolds is the allegedly unfounded disciplinary letter given by Reynolds to Akins on November 2, 1998.

**E. Was the law clearly established?**

Because plaintiffs have alleged facts sufficient to make a claim for First Amendment retaliation based on the written reprimands and the loss of all of their job duties for one and a half months, the next question is whether that constitutional right was "clearly established" at the time of the violation. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). An official action will not necessarily be protected by qualified immunity simply be-

cause the very action in question has not previously been held unlawful, but "in the light of the pre-existing law the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citations omitted). It is thus clear that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. "[T]he salient question . . . is whether the state of the law . . . gave [the officers] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id.*

The "fair and clear notice" that is "the cornerstone of qualified immunity" can be given to government officials in various ways. *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (citing *Marsh v. Butler County*, 268 F.3d 1014, 1031-32 (11th Cir. 2001) (en banc)). "First, the words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law*." *Id.* (emphasis in original). This kind of case is an "obvious clarity" case. *Id.*

Second, if the conduct is not so egregious as to violate a constitutional provision on its face, the Court must turn to case law. *Id.* at 1351. "When looking at case law, some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts." *Id.* (citing *Marsh*, 268 F.3d at 1031-32 n.9). These decisions control "with obvious clarity" a wide variety of later factual circumstances. *Id.* (citing *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Third, if there is no case law with a broad holding that is not tied to particularized facts, the Court must look at precedent that is tied to the facts. *Id.* The Court must look for cases in which the Supreme Court, the Eleventh Circuit, or the pertinent state supreme court has said that particular conduct is unconstitutional in particular circumstances. *Id.*

Here, at the time that Blount and Revell were given reprimands by Gates, allegedly for eavesdropping, and at the time that Reynolds gave Akins a reprimand for insubordination, the law was clearly established that a reprimand constitutes an adverse employment action for purposes of First Amendment retaliation analysis. *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994) (citations omitted). This is the kind of broad statement of principle in case law that is not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts. *Vinyard*, 311 F.3d at 1351 (citation omitted). This decision controls "with obvious clarity" a wide variety of later factual circumstances. *Id.*

Second, at the time that defendant Gates acted to relieve plaintiffs of all of their job duties, the law was clearly established that to be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment. *Bickel v. Burkhart*, 632 F.2d 1251, 1255 n.6 (5th Cir. Unit A 1980).[18] It was further well-established that job duties are conditions of employment. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1561 (11th Cir. 1986).

A few Eleventh Circuit cases have dealt with the removal of job duties, as a retaliatory action. In *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994), a plaintiff alleging retaliation based upon her First Amendment activity produced evidence that she was transferred to a job two pay grades lower than her old position, that her eligibility for salary increases was less in her new position than in her old, and that her new position involved less responsibility and more menial tasks than her old job. *Id.* at 1564. The Eleventh Circuit held that

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[18] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

the plaintiff's transfer to the new position constituted an adverse employment action. *Id.*

In *Bass v. Board of County Comm'rs*, 256 F.3d 1095 (11th Cir. 2001),[19] the plaintiff alleging retaliation was not given the same duties as other individuals holding his job title. *Id.* at 1118. The plaintiff was given no routine work assignments and was forced to perform custodial and clerical duties under the supervision of less senior personnel. *Id.* The defendant also denied him the opportunity to earn overtime pay and certain other types of bonus pay which were available to other individuals holding his position. *Id.* Prior to filing his EEOC complaint, plaintiff was allowed to engage in certain optional duties for extra income, but he was not allowed to do so after he filed the complaint. *Id.* Finally, plaintiff was required to take tests to maintain his level of pay, while none of the other individuals holding that position were required to do so. *Id.*

The Eleventh Circuit concluded that the defendant's actions deprived the plaintiff of compensation which he otherwise would have earned and thus clearly constituted adverse employment actions. *Id.* (citing *McCabe*, 12 F.3d at 1564). The court held that, while these actions might not have individually risen to the level of adverse employment action, when those actions were considered collectively, the total weight of them did constitute an adverse employment action. *Id.* at 1118-19 (quoting *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) ("'It is enough to conclude, as we do, that the actions about which [plaintiff] complains considered collectively are sufficient to constitute prohibited discrimination. We need not and do not decide whether anything less than the totality of the alleged reprisals would be sufficient.'")

In both these cases, then, the Eleventh Circuit was faced with plaintiffs who suffered the loss of their normal job

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[19] The retaliatory acts here occurred before 2001.

duties, as well as a number of other actions taken against them. In each case, the court found that, under the totality of the circumstances, the plaintiffs had shown they were subjected to adverse employment actions. In neither case did the court hold that loss of job duties alone constituted adverse employment action. Nevertheless, as the law is clearly established that actions affecting job conditions can constitute adverse actions and as removal of all duties clearly affects one's conditions of employment, the Court will assume that defendant Gates was on notice that his action in removing plaintiffs' job duties for the period of a month and a half was an adverse action.

In sum, the Court finds that plaintiffs have alleged adverse employment actions that survive a qualified immunity defense as to any written reprimands and as to the removal of their job duties for over a month.

The Court, however, still concludes that the defendants are entitled to summary judgment based on the plaintiffs' initial failure to show that their speech was clearly protected by the First Amendment. That is, whether the actions taken against them clearly constituted retaliation or not, the plaintiffs had to first show that the retaliation was in response to protected speech on matters of public concern. For the reasons detailed above, plaintiffs failed to do so. Therefore, the Court **DENIES** Plaintiffs' Motion for Reconsideration [48].

## CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion for Reconsideration [48].

SO ORDERED, this 31st day of March, 2004.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed March 28, 2003]

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Civil Action No. 1:00-CV-2212-JEC

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JANICE AKINS, DEBRA BLOUNT, and NATALIE REVELL
*Plaintiffs*,

v.

FULTON COUNTY, GEORGIA, JOHN GATES,
and VANESSA REYNOLDS,
*Defendants.*

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### *ORDER*

This case is before the Court on defendants' Motions for Summary Judgment [26, 27, 28] and Plaintiffs' Motion to Extend Page Limitation [34]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that defendants' Motions for Summary Judgment [26, 27, 28] and Plaintiffs' Motion to Extend Page Limitation should be **GRANTED**.[1]

### *BACKGROUND*

Plaintiffs Janice Akins, Debra Blount, and Natalie Revell filed this action on August 25, 2000. At all times relevant to this action, plaintiffs were employed by defendant Fulton County in the Fulton County Purchasing Department. Plain-

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[1] As to the substantive motion for summary judgment made on behalf of the individual defendants, the Court has invited plaintiffs to file a motion for reconsideration and provide further briefing.

tiffs allege in their Complaint that they spoke out on matters of public concern and were unlawfully retaliated against by the defendants for exercising their First Amendment rights to free speech when defendants constructively discharged them from their positions. Defendants deny plaintiffs' allegations and argue that they are entitled to summary judgment as a matter of law. All defendants argue that plaintiffs' First Amendment rights were not violated. Further, the two individual defendants argue that they are protected from liability by qualified immunity. Defendant Fulton County argues that it may not be held liable because it had no official policy that injured plaintiffs and because the individual defendants were not final policy makers regarding actions concerning plaintiffs.

Each of the three defendants submitted separate Motions for Summary Judgment [26, 27, 28]. In response, plaintiffs submitted Plaintiffs' Consolidated Brief in Opposition to Defendants' Motions for Summary Judgment [35]. As plaintiffs point out, most of the arguments raised in each of the three Motions for Summary Judgment are identical as to whether plaintiffs have proved a First Amendment claim. The major differences are that the individual defendants' briefs contain arguments pertaining to their qualified immunity, while Fulton County's brief contains arguments on its lack of responsibility for the actions of its employees. The Court will address defendants' Motions for Summary Judgment in this consolidated Order.

Unless otherwise indicated, the Court draws the undisputed facts from "Defendants' Combined Statement of Material Facts Upon Which There is No Genuine Issue to Be Tried" ("SMF") [29]. If, however, plaintiffs have disputed a specific fact and pointed to evidence in the record supporting their version of events, the Court has viewed all evidence and factual inferences in the light most favorable to plaintiffs, as required on a defendant's motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 587 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993). Accordingly, the following facts are either not disputed or are viewed in the light most favorable to the plaintiffs.

At all times relevant to this action, plaintiffs were employed in the Fulton County Purchasing Department. (Compl. [1] at ¶ 2). Plaintiff Akins was employed as Chief Assistant Purchasing Agent/Contractor and plaintiffs Blount and Revell were employed as Contracting Officers. (*Id.*) Defendant John Gates was the Purchasing Agent and head of the Fulton County Purchasing Department and was plaintiffs' ultimate supervisor. (*Id.*) Defendant Vanessa Reynolds was the Acting Purchasing Administrator and became plaintiffs' supervisor in June of 1998. (*Id.*; SMF at ¶ 5.)

Defendant Gates began his employment with Fulton County in October of 1997. (SMF at ¶ 4.) Gates began planning a reorganization of the Purchasing Department in 1997 shortly after assuming his position as its Director. (*Id.* at ¶ 9.) Plaintiffs and Gates began having conflicts in late 1997 and early 1998. (*Id.* at ¶ 10.) In plaintiff Akins's opinion, Gates constantly kept his proposed reorganization plan "dangling before people" in a "threatening and intimidating way." (Akins Dep. at 43.) This uncertainty about whether various jobs in the department would be eliminated or altered led to the employees becoming fearful. (*Id.*) Plaintiff Blount noticed that Gates would "throw . . . barbs" at people that started to undermine how they felt about their work. (Blount Dep. at 21.) Overall, Gates created an "intimidating, threatening atmosphere" that caused the office to be nonproductive. (Akins Dep. at 44.)

In February of 1998, plaintiffs began to take issue with various decisions that Gates made and with his management style. (SMF at ¶ 11.) This pattern of conflict between Gates and plaintiffs continued up to August 27, 1998. (*Id.* at ¶ 12.)

For example, at an August 15 staff meeting, at which the contracting staff disagreed with a decision that Gates had made, he responded that they were not paid to challenge his decisions. (Fulton County's Br. in Supp. of its Mot. for Summ. J. [hereinafter "Fulton Cnty's Br."] [26] at Exh. 8, Item 11.) Gates stated that when he made a decision, it was "fair, firm, and final" and was "the law." (*Id.*) He informed his employees that they were dysfunctional and could not get out of a paper bag. (*Id.*) Prior to August 27, 1998, plaintiffs became concerned about the impact of the reorganization of the Purchasing Department and were concerned about the loss of their own jobs. (SMF at ¶¶ 13, 14.)

On August 27, 1998, plaintiffs met with Emma I. Darnell, a member of the Fulton County Board of Commissioners. (SMF at ¶ 16.) At this meeting, the plaintiffs complained about a number of problems in the Purchasing Department. These included bad working conditions, disrespect of employees, reorganization of the Department, and termination of jobs. (*Id.* at 17.) Plaintiffs claim, however, that the main reason they had asked for the meeting was to address certain bidding and contracting irregularities that they had observed, and that this subject was the main thrust of their discussions. (Pls' Statement of Material Facts Showing Genuine Issues to be Tried ("Pls' SMF") [35] at ¶ 7.) "Throughout the course of their employment the Plaintiffs had continuing concerns that Bidding policies and procedures were not being followed within the Purchasing Department and that possible wrongdoing was occurring." (*Id.* at ¶ 5.) The plaintiffs had noticed that "bids were being accepted and awards were being made that were not in compliance with Purchasing Department Rules and Regulations." (*Id.*) The plaintiffs believed that the bidding irregularities constituted a matter of public concern "because it directly affected fiscal responsibility and ethics within county government." (*Id.* at ¶ 6.) The plaintiffs reported specifically on problems or irregularities that they had observed in six different bid files that the Purchasing Depart-

ment had handled. (*See id.* at ¶¶ 8-13.) After the August 27 meeting, plaintiffs later reported several more irregularities with other files to either Commissioner Darnell or to her assistant. (*See id.* at ¶¶ 14-19.)

At the meeting with Darnell, the subject of possible sex discrimination within the Purchasing Department was also discussed. (Akins Dep. at 29.) Plaintiff Akins informed Darnell that Akins, the only female manager within the Purchasing Department, was treated differently from her male counterparts. (*Id.* at 30.) In meetings, Gates would make comments about female employees, such as that they were Georgia peaches. (*Id.*) Darnell recommended that the plaintiffs speak to the Fulton County Equal Employment Office and fill out an intake form, which they did. (*Id.*)

Defendant Gates was aware of plaintiffs' August 27 meeting with Darnell and that they were going to report the perceived bid irregularities. (*Id.* at ¶ 20.) In fact, there were several other Purchasing Department employees who had originally planned to attend the meeting with Darnell, but who did not because they knew that Gates was aware of the meeting. (Akins Dep. at 14-15.) These employees "became very frightened to attend and they backed out." (*Id.* at 15.) On the evening of August 26, plaintiff Blount heard Gates "ranting and raving down the hallway and shouting that 'the line has been drawn in the sand between the north and the south, and to be careful what side you choose because one will lose.'" (Pls' SMF at ¶ 20.) Plaintiffs assert that, while they "had some issues with Gates concerning his decisions and management style" prior to the meeting with Darnell, after the meeting "the work environment drastically changed for the worse" and became "materially adverse." (*Id.* at ¶ 22.) Following the meeting, a series of "discordant events" between the plaintiffs and the defendants continued to occur. (SMF at ¶ 18.)

On August 27, the day of the meeting with Darnell, plaintiffs Blount and Revell received disciplinary notices for eavesdropping that they argue were unjustified. (Pls' SMF at ¶ 24.) On September 9, Gates "berated" Blount for taking notes at a meeting and forced her to repeat what he had said in front of the others in attendance. (*Id.* at ¶ 25.) Plaintiff Akins was kept from attending various committee meetings that she had always attended in the past and was reprimanded for permitting Blount and Revell to report the irregularities in the bidding process. (*Id.* at ¶¶ 26, 27.) Gates prohibited all other employees in the Purchasing Department from communicating with the plaintiffs and immediately questioned anyone he saw speaking with them about what was said. (*Id.* at ¶¶ 28.) This caused the plaintiffs' co-workers to avoid them in the office. (*Id.*) Gates began to force all of the plaintiffs to switch offices, and on one occasion required Revell to move twice in one day. (*Id.* at ¶ 30.) On September 18, 1998, defendants Gates and Reynolds accused Blount of sabotage regarding a bid in front of two witnesses. (*Id.* at ¶ 32.)

On October 8, 1998, the plaintiffs were asked to turn over all of their bid files, essentially relieving them of all of their duties and leaving them with "absolutely no work." (*Id.* at ¶ 35.) The plaintiffs were left with no duties to perform at work for approximately one and a half months before Gates informed Akins that the situation had been a misunderstanding, and that they were never actually relieved of their duties. (*Id.* at ¶ 36.) Even though some of Akins's duties were restored, she did not receive all of them back, and some files were never returned to her. (*Id.*) Gates later alleged that she had abandoned her duties. (*Id.*)

On December 4, 1998, defendant Reynolds physically threatened Akins. Reynolds approached Akins and stated that she had heard that Akins was saying that she had never graduated from high school. (Akins Dep. at 71.) Reynolds said, "For your information, I graduated from high school in

1973 at Douglas." (Pls' SMF at ¶ 43.) Reynolds informed Akins that, "Putting all friendships aside, you had better not ever put my name in your mouth again." (*Id.*) Reynolds then "took a very threatening posture," causing Akins to feel intimidated by her. (*Id.*)

On January 7, 1999, Akins received a memorandum from Gates threatening to suspend her for insubordination. (*Id.* at ¶ 47.) Gates ordered Akins to conduct training on a computer system used by the Purchasing Department, but Akins refused because she herself had not been trained on the system. (*Id.*) She had requested to attend an earlier training session but had been refused; instead, Gates and Reynolds had attended and returned without information on how to implement the new system. (*Id.*) Gates later lowered Akins's performance rating on her evaluation. (*Id.*)

Plaintiff Blount resigned her employment with Fulton County in January of 1999. (SMF at ¶ 22.) Upon leaving the Purchasing Department, she accepted a position with a lesser title, less responsibility, and a reduction in salary. (Pls' SMF at ¶ 59.)

In March of 1999, plaintiff Akins transferred to the office of Clerk of Superior Court of Fulton County. (SMF at ¶ 23.) She lost no pay, vacation, health coverage, sick leave, or any other benefit by reason of her transfer. (*Id.* at ¶ 25.) However, the position to which she transferred was allegedly a less desirable one, in which she was placed in a basement and made responsible for counting computer equipment and for giving technical assistance over the telephone, a task for which she was not trained. (Pls' SMF at ¶ 57.)

In June of 1999, plaintiff Revell transferred to a position in the Fulton County Fire Department, where she is still employed. (SMF at ¶ 27.) Revell lost no pay, vacation, health coverage, sick leave, or any other benefit by reason of her transfer. (*Id.* at ¶ 29.) Her current duties include management

of the procurement activities of the Fulton County Fire Department. (*Id.* at ¶ 31.) When Revell transferred to the Fire Department, her salary was approximately $46,000 per year. (*Id.* at ¶ 30.) Her current salary is $63,223 per year. (*Id.* at ¶ 32.)

## *DISCUSSION*

Plaintiffs' Complaint [1] alleges that their rights under the First Amendment were violated by the actions of the defendants. (Compl. [1] at ¶ 1.) Plaintiffs allege that they spoke out on matters of great public concern. (*Id.* at ¶ 15.) They further allege that defendants engaged in such vicious retaliatory action against them because of their speech that they were constructively discharged. (*Id.* at ¶¶ 18, 19.) Plaintiffs bring suit for this alleged violation of their First Amendment rights under 42 U.S.C. § 1983. (*Id.* at ¶ 1.) The legal issues include whether plaintiffs spoke out on issues of public concern, whether individual defendants Gates and Reynolds are entitled to qualified immunity, and whether Fulton County may be held liable under 42 U.S.C. § 1983.

### I. *Summary Judgment Standard*

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of every element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning

an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* at 322-23.

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at 323; *Apcoc, Inc. v. Fidelity Nat'l Bank*, 906 F.2d 610, 611 (11th Cir. 1990). The movant is not required to negate his opponent's claim, however. The movant may discharge his burden by merely "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. After the movant has carried his burden, the nonmoving party is then required to "go beyond the pleadings" and present competent evidence[2] designating "'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). While the court is to view all evidence and factual inferences in a light most favorable to the nonmoving party, *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

A fact is material when it is identified as such by the controlling substantive law. *Id.* at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475

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[2] The nonmoving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. *Celotex*, 477 U.S. at 324.

U.S. 574, 586–87 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, 477 U.S. at 249-50. Thus, to survive a motion for summary judgment, the nonmoving party must come forward with specific evidence of every element material to that party's case so as to create a genuine issue for trial.

**II.** ***Merits of First Amendment Retaliation Claim***

The First Amendment provides that Congress shall make no law abridging the freedom of speech. U.S. Const. amend. I. This right was made applicable to the states by the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). "Although it is well-established that an employer may not discharge a public employee in retaliation for the employee's exercise of his right to freedom of speech, that right is not absolute." *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1157 (11th Cir. 2002) (citing *Rankin v. McPherson*, 483 U.S. 378 (1987)). "The problem in any case is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

Courts have developed a four step analysis by which to judge an employee's claim that he was retaliated against by his public employer as a result of the employee's exercise of his right to freedom of speech. *Anderson v. Burke County*, 239 F.3d 1216, 1219-20 (11th Cir. 2001). The first two steps constitute questions of law that must be determined by the court. First, the court must determine the threshold legal question of whether the employee's speech may be "fairly characterized as constituting speech on a matter of public concern." *Brochu*, 304 F.3d at 1157 (citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)). This determination involves an examination of the content, form, and context of

the speech. *Id.* (citation omitted). Only if the court answers this question affirmatively does it need to move on to the next inquiry: weighing the interests of the public employee against the interests of the public employer, again considering the context and circumstances of the employee's speech. *Id.* This balancing test, derived from the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), as modified by *Connick v. Myers*, 461 U.S. 138 (1983), has become known as the *Pickering-Connick* balancing test.

The factual questions that constitute the third and fourth prongs of the test arise only if the first two prongs of the test are satisfied. The third prong requires a determination whether the protected speech played a substantial part in the employment decision. *Brochu*, 304 F.3d at 1157 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Finally, if the particular speech did play a substantial part in the employer's decision, the employer must prove that it would have reached the same decision even in the absence of the protected speech. *Id.* (citation omitted). This fourth stage is sometimes called the "but for" test; to satisfy it, the employer must show that "its legitimate reason, standing alone, would have induced it to make the same decision." *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)). *Accord Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) (mixed motive defense remains viable in both Title VII and Section 1983 First Amendment retaliation cases, notwithstanding the weakening of the same in substantive Title VII claims).

The first question that the Court must address is whether the plaintiffs spoke on matters of public concern. "To involve a matter of public concern, a government employee's speech must 'relate to any matter of political, social, or other concern to the community.'" *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1289 n.13 (11th Cir. 2000) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)). If the governmental em-

ployee speaks "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," a federal court will rarely be the appropriate forum to gauge the wisdom of any decision taken by the public employer in response to the employee's speech. *Id.* (citation omitted). "Because 'an employee's speech will rarely be entirely private or entirely public,' the 'main thrust' of the employee's speech must be determined." *Id.* (citing *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993)). This determination is made by examining the content, form, and context of a given statement, as revealed by the whole record. *Id.* (citations omitted). "When there is a personal element to the speech, complaints of wrongdoing within a public agency may not constitute speech on a matter of public concern." *Id.* (citing *Maggio v. Sipple*, 211 F.3d 1346, 1352 (11th Cir. 2000) (citation omitted).

Defendants have made a strong argument that the "main thrust" of the plaintiffs' complaints to Commissioner Darnell were personal in nature; that is, plaintiffs expressed concerns about Gates' volatile management style and his reorganization plans. A trial might well permit this Court to evaluate the evidence and concur with defendants' assessment. At this juncture, however, where the Court has before it only affidavits of the plaintiffs, for the most part, as well as their deposition testimony,[3] and viewing the evidence in the light most favorable to the plaintiffs, the Court must conclude that plaintiffs spoke on a matter of public concern in their August 27, 1998, meeting with Fulton County Commissioner Emma Darnell. Specifically, plaintiffs indicate that they spoke out on alleged bid irregularities and other violations of rules and procedures that they had observed during the course of their employment. "A core concern of the first amendment is the

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[3] Commissioner Darnell's testimony was cited in defendants' brief, but the deposition was not filed. In the new round of briefing, the Court would like for the transcript of her deposition testimony to be submitted.

protection of the 'whistle-blower' attempting to expose government corruption." *Walker v. Schwalbe*, 112 F.3d 1127, 1131 (11th Cir. 1997) (quoting *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 (11th Cir. 1989)).

It is true that the plaintiffs discussed concerns about the departmental reorganization and poor work environment in their meeting with Darnell. (*See, e.g.*, Akins Dep. at 24-32.) The plaintiffs have, however, presented potentially credible evidence that they also discussed problems of matters affecting the public interest, including bid irregularities and violation of Purchasing Department procedures with Darnell. (*See* Pls' SMF at ¶¶ 8-13; Akins Dep. at 45-48.) Bid irregularities would clearly constitute a matter of public concern. Moreover, the form and context of the plaintiffs' speech—a meeting with a Fulton County Commissioner, one of the members of the governing body of the county—arguably bolsters plaintiffs' argument that their speech concerned a matter of public interest. That is, these complaints were not lodged privately and informally to an immediate supervisor, but in a more official setting. *See Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir. 1997). Viewing the content, form, and context of plaintiffs' speech in the light most favorable to them, plaintiffs have presented evidence that a "main thrust" of their speech concerned the bid irregularities and, therefore, that their speech concerned a matter of public interest. Thus, plaintiffs have presented a sufficient factual predicate to satisfy the first prong of the balancing test.

Second, this Court must weigh the interests of the plaintiffs against the interest of their public employer. The plaintiffs must show that their First Amendment interests outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1295 (11th Cir. 1998) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). In other words, the ques-

tion is "whether the government has an interest in preventing the speech." *Walker*, 112 F.3d at 1131.

The Court concludes that the First Amendment interest of the plaintiffs in reporting possible bid irregularities and rules violations is high. As noted above, protection of whistle-blowers who would expose possible government corruption is an important First Amendment value. Correspondingly, the Court finds that Fulton County's interest in preventing such speech is low. It is difficult to discern how the prevention of speech about improper bid practices of the Purchasing Department, which could lead to the awarding of contracts at inflated prices or to unqualified vendors, could promote the efficiency of the public service performed by the office. To the contrary, it seems obvious that speech exposing questionable or harmful practices in a department would likely lead to more efficient public service, by causing such wrongful practices to be exposed and ended. Consequently, the Court concludes that the value of plaintiffs' speech concerning matters of public interest outweighs its potential for disruption of governmental workplace efficiency. *Goffer v. Marbury*, 956 F.2d 1045, 1049 (11th Cir. 1992). Therefore, plaintiffs have satisfied the second prong of the balancing test.

Third, the plaintiffs must show that their protected speech played a substantial part in the retaliatory acts they allege were taken against them. A plaintiff's burden in this regard is not a heavy one. *Stanley*, 219 F.3d at 1291 (citations omitted). The Court must examine the record as a whole to ascertain whether plaintiffs have presented sufficient evidence for a reasonable jury to conclude that their protected speech was a "substantial" motivating factor in the decision to retaliate against them. *Id.* The Court may look to such factors as whether the adverse action closely follows the protected speech, any comments made by the employer that might indicate the speech was a factor in the employment decision, and

whether there was any management hostility to the speech in question. *Id.* at 1291 n.20.

Defendants allege that events that occurred after the plaintiffs' August 27, 1998, meeting with Commissioner Darnell "were a continuation of difficulties between the parties that predated the Meeting, not a reaction to or retaliation for Plaintiffs' speech at the Meeting." (Fulton Cnty's Br. [26] at 13.) While it is true that relations between the plaintiffs and defendants were difficult before the August 27 meeting, plaintiffs have presented evidence suggesting that the relationship totally deteriorated after that date. In fact, two of the alleged acts by defendants that most strongly support a finding of a constructive discharge—the withdrawal of all of plaintiffs' work and the prohibition of their coworkers from speaking to them—occurred after August 27, 1998. All of the plaintiffs had either resigned their employment or transferred out of the Purchasing Department by June of 1999, about ten months after the meeting with Darnell. The alleged adverse action against the plaintiffs closely followed their protected activity, making it reasonable to infer that the activity was the cause of any adverse employment action. *Stanley*, 219 F.3d at 1291 n.20.

Furthermore, the statement by defendant Gates, overheard the evening before plaintiffs' meeting with Darnell, that "the line has been drawn in the sand between the north and the south, and to be careful what side you choose because one will lose," (Pls' SMF at ¶ 20), seems to be a comment by the employer indicating that the speech the plaintiffs would engage in the next day would be a major factor, if not the only factor, in the action taken against them. Finally, it is obvious that some superiors could be hostile to the speech in question because it might potentially expose wrongful practices that they had engaged in, possibly subjecting them to loss of their jobs or even to criminal liability. The Court concludes that plaintiffs have presented sufficient evidence for a reasonable

jury to conclude that their protected speech was a "substantial" motivating factor in any decision to retaliate against them, as required by the third prong of the balancing test.

Finally, the fourth step of this analysis involves an affirmative defense whereby a governmental employer is permitted to show that a legitimate reason would have motivated it to make the same employment decision in absence of the protected speech. *Stanley*, 219 F.3d at 1292-93 (citations omitted). "An employer must show 'by a preponderance of the evidence, that, in light of its knowledge, perceptions, and policies at the time of the termination, it would have [constructively] terminated the employment regardless of the protected speech.'" *Id.* at 1293 (quoting *Bd. of County Comm'rs, Wabaunsee Cty., Kansas v. Umbehr*, 518 U.S. 668, 685 (1996)). Defendants state only that the actions plaintiffs complain of as retaliatory were within defendants' discretion as managers and that they resulted not from retaliation but from the pre-existing hostility between the parties. (Fulton Cnty's Br. [26] at 20.) The finder of fact could reasonably infer, perhaps, taking the evidence in the light most favorable to plaintiffs, that the defendants would not have taken the same action in the absence of their protected conduct.

## III. *Qualified Immunity of Gates and Reynolds*

### A. Standard—Generally

Even though plaintiffs have established a genuine issue of material fact as to whether the individual defendants retaliated against them, as a result of their First Amendment activity, defendants Gates and Reynolds may be protected from liability by the doctrine of qualified immunity. Qualified immunity, for the purposes of a Section 1983 action, is designed to shield all government actors from civil liability except those who are "plainly incompetent" or who "knowingly violate the law." *Cooper v. Smith*, 89 F.3d 761, 764 (11th Cir. 1996) (citation omitted). "[O]nly in exceptional

cases will government actors have no shield against claims made against them in their individual capacities." *Lassiter v. Alabama A&M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994). Moreover, "[t]he public's strong interest in avoiding government disruption requires that qualified immunity be an immunity from trial, not just from liability." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1556 (11th Cir. 1993), *modified on other grounds*, 14 F.3d 583 (11th Cir. 1994).

In resolving whether defendants are entitled to qualified immunity, the Court must determine "whether the legal norms allegedly violated by the defendant[s] were clearly established at the time of the challenged actions." *Cross v. Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). Therefore, defendants are immune from plaintiffs' Section 1983 claims unless their actions violated clearly established law. *Mitchell*, 472 U.S. at 530; *Cross*, 49 F.3d at 1503. Plaintiffs bear the burden of showing that defendants violated clearly established legal rights. *Cross*, 49 F.3d at 1503; *Busby v. City of Orlando*, 931 F.2d 764, 773 (11th Cir. 1991). An official is immune from liability if applicable law is unclear or a reasonable official "could have believed that his actions were lawful in light of the clearly established law and the information possessed by the officer." *Cross*, 49 F.3d at 1503 (quoting *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1504 (11th Cir. 1990)).

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Stanley*, 219 F.3d at 1285 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Once a defendant shows that the function in question was discretionary, "the burden is on the plaintiff to show that, when the defendant acted, the law established the contours of a right so clearly

that a reasonable official would have understood his acts were unlawful." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), modified, 14 F.3d *583* (1993). Accordingly, there is a two-prong test to determine if qualified immunity applies: (1) were defendants performing a discretionary function when they were performing the actions at issue in this case and (2) did defendants' actions violate "clearly established law?"

**B. Were defendants performing discretionary functions?**

Defendants argue that the actions taken by Gates and Reynolds that are alleged to have violated plaintiffs' rights were all discretionary functions of their positions. A government official ordinarily acts with discretionary authority when he makes any employment decision, such as hiring, firing, reprimanding, or demoting an employee. *See Davis v. Scherer*, 468 U.S. 183, 196 (1984). Indeed, plaintiffs do not dispute that the individual defendants were performing discretionary functions when they took the alleged actions against plaintiffs that are at issue in this case. Since "[t]here is no doubt in the present case that the officers were acting within their discretionary authority, . . . the sole issue is whether their actions violated clearly established law." *Hartsfield v. Lemacks*, 50 F.3d 950, 953 (11th Cir. 1995). The burden is on plaintiffs to show that defendants violated clearly established law. *Id.*

**C. Have plaintiffs established the violation of a clearly established Constitutional right?**

As noted, plaintiffs cannot discharge their burden to show that defendants violated clearly established law "simply by referring to general rules or abstract rights" but, rather, must point to clearly established law. *Id.* at 954. "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstractions—but in studying how these

abstractions have been applied in concrete circumstances." *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269 (11th Cir. 1996) (quoting *Lassiter*, 28 F.3d at 1150). "When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Id.* at 269-70 (quoting *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmonson, J., dissenting), *approved en banc*, 998 F.2d 923 (11th *Cir.* 1993)), "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Id.* at 270 (quoting *Lassiter*, 28 F.3d at 1150) (emphasis in original).

For law to be clearly established, it must have been in effect at the time of the alleged unconstitutional conduct. "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 827 n.4 (11th Cir. 1997).

Because plaintiffs have alleged that defendants violated their rights to freedom of speech, the Court must determine whether the law was clearly established prior to August, 1998, the time at which the individual defendants' alleged retaliation began, that defendants' actions violated the plaintiffs' rights under the First Amendment. In any Section 1983 case, the plaintiff typically faces a daunting task in proving that the law was clearly established enough to have placed an offending defendant official on notice that his

conduct violated the constitutional rights of the complaining plaintiff. The plaintiff alleging First Amendment retaliation faces even greater challenges.

Specifically, to find liability under the First Amendment, a Court must apply a four prong balancing test, also known as the *Pickering-Connick* test, which is discussed *supra* at Section II, 14-16. As noted in that discussion, the plaintiff must satisfy three of the prongs of the test,[4] by demonstrating (1) that her speech concerned a matter of public concern; (2) that the value of her speech outweighed its potential for disruption; and (3) that her protected speech played a substantial part in the defendant's decision to retaliate against her. To defeat qualified immunity, the plaintiff must show that the law was clearly established enough to have alerted a reasonable official in the defendant's position (1) that the plaintiff's speech concerned a matter of public concern and (2) that the value of this speech would outweigh its potential for undermining the efficiency of the workplace.[5]

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[4] If the plaintiff has met the first three prongs of the test, the defendant then has a final opportunity to escape liability by establishing the fourth prong of the test. This fourth prong, which recognizes an affirmative defense on the part of the defendant, allows the defendant to show that, for legitimate reasons, it would have taken the same employment action against the complaining plaintiff, even had the latter not engaged in protected speech. *See* discussion *supra* at 22.

[5] The third prong of the *Pickering-Connick* test examines the causal relationship between the protected speech and the retaliation: that is, was the protected speech a substantial reason for the adverse action taken by the defendant? Because this third prong does not focus on the retaliator's *knowledge* whether his conduct would violate the law, but instead looks only to the existence of a causal nexus that the jury, after the fact, must determine, the third prong of the balancing test is not the subject of a qualified immunity inquiry.

The fourth prong of the test, which arises only if the plaintiff survives the first three prongs, permits a defendant to demonstrate that he would have reached the same employment decision even in the absence of the

Thus, each plaintiff must first demonstrate that defendants knew that she had made the speech in question (the complaints to Commissioner Darnell). The evidence is sufficient to create a jury question on this fact. The plaintiffs must also demonstrate, however, that a reasonable official would have *known* that plaintiffs' complaints to Commissioner Darnell touched on a matter of public concern. To meet this burden, again, the plaintiffs must show that the law was clearly established enough to have indicated to a reasonable official that the plaintiffs' speech could be so categorized. Second, the plaintiffs must show that a reasonable official would have known, through the existence of clearly established law, that the value of such speech (revealing bid irregularities) outweighed its potential for creating disruption in the office (by going over the head of a superior to the County Commissioner).

Finally, there is a third fact that plaintiffs likely must show here, consistent with meeting these two prongs of the test. Specifically, plaintiffs have claimed that they were constructively discharged as a result of the severe retaliation that defendants directed at them. The Court presumes that plaintiffs must show that defendants were aware that the retaliatory actions targeted at plaintiffs were substantial enough to constitute a constructive discharge of these plaintiffs. Obvi-

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protected conduct. *See* discussion *supra* at 15-16 and 22-23. While not always the proper subject of a qualified immunity inquiry, this "mixed-motive" affirmative defense can become a part of such an analysis, and can trigger the grant of summary judgment for the defendant, if the record "indisputably establishes" that the defendant was actually "motivated, at least in part, by lawful considerations." *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1296 (11th Cir. 2000); *Foy v. Holston*, 94 F.3d 1528, 1533-36 (11th Cir. 1996). In this case, however, there is no mixed-motive defense and, even if there were, the record does not "indisputably establish," at least as to defendant Gates, any lawful reason for his motivation to retaliate. Thus, the fourth prong is not part of this Court's examination of the qualified immunity defense.

ously, if a defendant terminates a plaintiff's employment, it is clearly established, as well as obvious, that such conduct would constitute an adverse action directed against the employee. Yet, a "constructive discharge" is not a discrete, instantly recognizable act, but instead is a legal label that courts place on given conduct that is so severe that a reasonable person would consider her working conditions intolerable and would therefore feel compelled to resign. *See Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1161 n.30 (11th Cir. 2002) (citation omitted). Courts often disagree on whether given conduct constitutes a constructive discharge, and this Court assumes that a plaintiff's claim of constructive discharge against a governmental official cannot survive a qualified immunity attack unless that plaintiff shows that a reasonable official would have known that the defendant's acts constituted a constructive discharge.

Turning first to the question whether defendants can be charged with an awareness that plaintiffs' speech constituted a matter of public concern and that the value of this speech necessarily outweighed its potential disruption to the functioning of the office, the case law has clearly noted the difficulty that a plaintiff, in any First Amendment retaliation case, faces in making this showing. Indeed, because any analysis of a retaliation claim under the *Pickering-Connick* test will "involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules. . . *a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful.*" *Martin v. Baugh*, 141 F.3d 1417, 1420 (11th Cir. 1998) (emphasis added). To establish such notice, the plaintiff will have to "*either produce a case in which speech materially similar* to [hers] in all *Pickering-Connick respects was held protected*, . . . or show that, on the facts of [her] case, *no reasonable person could believe that both prongs of the test had not been met.*"

*Maggio v. Sipple*, 211 F.3d 1346, 1354-55 (11th Cir. 2000) (quoting *Martin v. Baugh*, 141 F.3d 1417, 1420 (11th Cir. 1998)) (emphasis added).

Each party posits an Eleventh Circuit case that purportedly resolves the question in the particular party's favor. Given the confluence of these two, arguably inconsistent cases, the Court has found the matter of qualified immunity to be particularly difficult to resolve in this case. First, plaintiffs rely on *Walker v. Schwalbe*, 112 F.3d 1127 (11th Cir. 1997). In that case, the plaintiff had gone to state legislators to complain about systemic problems and improprieties in the way the region's VISTA program was being run; thereafter, the defendants demoted plaintiff and substantially reduced his salary, as well as visiting similar adverse actions on the two other employees who had presented the problems of the agency to the state legislators. *Id.* at 1128-30. Citing *Pickering* and *Bryson*, the panel concluded[6] that the law clearly established in 1991, the time when defendants acted, that a whistleblower, such as plaintiff, "could not be punished for his First Amendment speech." *Id.* at 1133. The panel noted that *Pickering* held that criticism of the Board of Education's allocation of school funds by an employee was a matter of public concern and that *Bryson* noted that a "core concern" of the First Amendment is protection of whistle-blowers who "expose government corruption." *Id.* at 1133 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 (11th Cir. 1989)). Accordingly, the *Walker* panel denied qualified immunity.

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[6] Actually, the majority opinion was written by a visiting senior judge from the Ninth Circuit. The two Eleventh Circuit panel members each filed a separate concurring opinion. Nevertheless, the Court does not read these concurring opinions as expressing disagreement with the holding of the "majority" opinion, as articulated *infra*.

The above summary of the panel's holding is as detailed as was the panel's discussion of the qualified immunity issue as to the first two prongs of the balancing test.[7] Plaintiffs rely on this case, arguing that their facts (Fulton County procurement employees complaining to Fulton County Commissioner) are similar enough to the facts in *Walker* (VISTA employee complaining to state legislator about systemic problems and improprieties in management of program) to have placed the defendants on notice that plaintiffs' speech fulfilled the requirement of the first two prongs of the balancing test. Indeed, this Court likewise finds similarities in the conduct described in *Walker* and in this case.

Defendants rely on an Eleventh Circuit case issued a year after *Walker* and only four months before the retaliatory conduct by the defendants in this case began. In this case cited by defendants, *Martin v. Baugh*, 141 F.3d 1417 (11th Cir. 1998), the facts are even closer to those presented by this case than are the facts set out in *Walker*. Specifically, in *Martin*, the plaintiff, a city employee, complained to a City Council member that the City was violating its own bid procedures when it solicited bids for upgrading its communications system. Plaintiff had not notified his supervisor prior to articulating these concerns and his supervisor chastised plaintiff for his insubordination in "going outside the chain of command." *Id.* at 1419. Subsequently, the supervisor issued written reprimands to plaintiff and assigned some of his duties to another employee. *Id.*

Focusing on whether plaintiff's supervisor, now a defendant in plaintiff's retaliation claim, enjoyed qualified immunity from the claim, the panel emphasized the tremendous obstacle that the qualified immunity doctrine presented to any

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[7] The panel did discuss at some length the applicability of the qualified immunity defense to the fourth prong: the mixed-motive defense. *Id.* at 1332-33. Again, the fourth prong of the test is not at issue in this case.

litigant asserting a First Amendment retaliation claim. This Court has already quoted part of the panel's opinion earlier in this discussion, but the panel's strong language bears repeating. Specifically, the panel noted that because both prongs of the balancing test "involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, *it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors* that inform an application of the *Pickering-Connick* test." *Id.* at 1420 (citations omitted) (emphasis added). "Consequently, *a defendant* in a First Amendment suit *will only rarely be on notice* that his actions are unlawful." *Id.* (emphasis added). The panel then repeated the familiar requirement for a plaintiff facing a qualified immunity defense: "Unless the plaintiff can either produce a case in which speech materially similar to his in all *Pickering-Connick* respects was held protected or show that, on the facts of his case, no reasonable person could believe that both prongs of the test had not been met, he cannot defeat a defense of qualified immunity." *Id.* (internal citation omitted).

Having articulated the above stringent requirements, the panel concluded that plaintiff Martin had failed to show a sufficiently similar case: "[plaintiff] points to no case, *and we find none after our own search*, that would have made it obvious to a person in [defendant's] position that plaintiff's speech . . . was *constitutionally* protected." *Id.* at 1421 (emphasis added). As *Walker* had been issued one year before Martin, the panel either was unaware of its existence or found it not sufficiently similar. This Court cannot discern which of these two possibilities occurred, however. If the latter is the case, the above sentence means that the Eleventh Circuit held that *Walker* did not put the defendants in *Martin* on notice—nor logically would it put the defendants in this case on notice—that the plaintiff's speech was constitutionally protected. If that is the holding, this Court cannot contravene it.

Unfortunately, the panel in *Martin* did not reach the merits of the case: that is, was Martin's speech constitutionally protected? Instead, the panel only decided that the defendants would not have been on notice that the speech was, in fact, protected. The Eleventh Circuit decided *Martin* on April 28, 1998. Thus, as the court's last word on the subject before plaintiffs in this case held their meeting with Commissioner Darnell on August 27, 1998, defendants argue that qualified immunity attaches to them. Plaintiffs, not surprisingly, contend that *Walker*, the earlier case, controls. Ultimately, the Eleventh Circuit will be required to sort through what may be an inconsistency in its precedent.

To rule on the pending motions, however, this Court will have to predict how it believes the Eleventh Circuit will come out on this question. One potential distinction between *Walker* and this case does exist. That is, in *Walker*, the plaintiff apparently spoke out only on issues that impacted the public interest; the plaintiff there did not air any concerns about his own working conditions. In this case, although discussing some matters of public concern, these plaintiffs did discuss with Commissioner Darnell personnel matters that clearly would not trigger public concern. Although this Court has determined that the record up to this point indicates that plaintiffs spoke out on a matter of public concern in their meeting with Darnell, this point is hotly contested by the defendants. Instead, the latter contend that, as a factual matter, the bid concerns were a small part of the presentation to the commissioner. Given the fact that plaintiffs' speech combined matters of public concern with matters that concerned only employees, it would arguably not be obvious to a retaliating official that the plaintiffs had sufficiently spoken out on matters of public concern so as to invest their speech with First Amendment protection. If it is unclear whether plaintiffs' complaints were of the kind held to involve a matter of public concern, then defendants' alleged actions did not violate *clearly established* First Amendment

rights, and they are entitled to qualified immunity. *Badia v. City of Miami*, 133 F.3d 1443, 1445 (11th Cir. 1998) (citations omitted). That is, expression of personal dissatisfaction within an otherwise protected speech context may remove cases from "inevitable" status under the *Pickering* balance. *Cooper v. Smith*, 89 F.3d 761, 766 (11th Cir. 1996) (citing *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989) and *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994)).

In other words, confusion and argument over whether plaintiffs spoke on matters of public concern or personal matters means that a reasonable person might not necessarily know that both prongs of the *Pickering-Connick* test had been met, requiring a conclusion that the defendants enjoy qualified immunity. Stated another way, a reasonable person could arguably not have predicted with any certainty how a court would rule on plaintiffs' claims.

The above reasoning may ultimately control how the Court rules on qualified immunity for purposes of the First Amendment analysis. Yet, even if the Court were to conclude, pursuant to *Walker*, that defendants did not enjoy a qualified immunity defense as to the First Amendment aspect of the claim, the Court would still have to decide whether the defendants could be charged with knowledge that the alleged retaliatory acts would necessarily constitute a constructive discharge. On this point, there has been little briefing by the parties.

Further, the plaintiffs have the burden of persuasion on this question, and the Court is not yet persuaded that qualified immunity does not apply, which conclusion suggests that this Court should grant defendants' motion for summary judgment on qualified immunity grounds. Yet, whatever the Court's ruling, the losing party will be entitled to an immediate appeal to the Eleventh Circuit. Because the Eleventh Circuit has emphasized repeatedly how fact-specific are

qualified immunity inquiries and because the facts asserted by plaintiffs are not as precisely drawn as they could be, the Court would like for these facts to be better organized for purposes of review.[8] Accordingly, the Court **GRANTS** both individual defendants' motions for summary judgment [27, 28] on qualified immunity grounds, but will permit the plaintiffs, within **thirty (30) days** from this date, to file a motion for reconsideration that sets out clearly the following factual and legal points.[9] Defendants shall respond within **thirty (30) days** thereafter.

First, *each* plaintiff shall set out precisely the alleged retaliatory acts that *each* defendant allegedly visited on the particular plaintiff. Defendant Reynolds has persuasively noted that plaintiffs collapse her rather limited conduct with that of defendant Gates. (*See* Br. in Supp. of Def. Vanessa Reynolds' Mot. for Summ J. [28] at 6-8; *see generally* Vanessa Reynolds' Br. in Reply to Pls.' Resp. to Mot. for Summ. J. [39].) Although the Court discussed its substantive holding on the merits of the First Amendment without distinguishing between the two defendants, the Court is doubtful that, on this record, any plaintiff has come near showing liability on the part of defendant Reynolds, much less the absence of qualified immunity for that defendant.

As to the retaliatory acts attributed to each defendant, the plaintiffs shall demonstrate that clearly established law would

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[8] The Court believes that both counsel did a good job on their briefs, but given the number of issues and the number of parties whose interaction is the subject of this case, plaintiffs' counsel did not focus as much on the remaining questions that now concern this Court. Accordingly, a supplemental brief that makes clear plaintiffs' factual and legal position, and defendants' response, will be helpful to this Court and to the Circuit.

[9] The Court dispenses with any of the usual showings that a losing party must make to persuade a court to reconsider its previous ruling. The Court views the briefs that it now directs to be filed to be more in the order of supplemental briefs.

alert a reasonable official that these acts are of a sufficient magnitude to alert such official that the retaliation constitutes a constructive discharge, which is the adverse action alleged by plaintiffs in their complaint.

As to the question whether defendants are protected by qualified immunity, plaintiffs and defendants may respond in whatever way they deem persuasive, given the Court's analysis, thus far, of this question. Thereafter, the Court will issue a final order on defendants' motions.

***IV. Liability of Fulton County under 42 U.S.C. § 1983***

Ordinarily, a plaintiff cannot hold a local governmental entity liable for the actions of its employees because 42 U.S.C. § 1983 does not provide for liability under a theory of *respondeat superior*. *Monell v. New York Dept. of Soc. Servs.*, 436 U.S. 658 (1978). Instead, a governmental entity may generally only be held liable under Section 1983 when the plaintiff shows that the deprivation of constitutional rights was made pursuant to an official "custom" or "policy." *See Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1479 (11th *Cir.* 1991); *Fundiller v. Cooper City*, 777 F.2d 1436 (11th Cir. 1985). To meet that burden of showing a policy or custom, a plaintiff must allege a series of incidents of unconstitutional conduct suggesting the existence of a "widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) ((citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)).

In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986), the Supreme Court explained that "municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances." Moreover, "where action is directed by those who establish governmental

policy, the municipality is equally responsible whether that action is taken only once or to be taken repeatedly." *Id.* at 481. "Thus, liability may arise from 'a course of action tailored to a particular situation and not intended to control decisions in later situations' . . . provided that 'the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.'" *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997) (quoting *Pembaur*, 475 U.S. at 481) (citations omitted). As long as the decision maker's decision is final, the municipality (or other local governmental entity) can be held liable under Section 1983. *Id.* at 1401; *accord McMillian v. Johnson*, 88 F.3d 1573, 1577 (11th Cir. 1996), *aff'd*, 520 U.S. 781 (1997).

The determination of whether a municipal employee is the final decisionmaker is a question of law. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *Brown v. City* of *Fort Lauderdale*, 923 F.2d 1474, 1480 n.10 (11th Cir. 1991). Moreover, "[w]hether a particular official has final policymaking authority is a question of state law," and should be determined by looking "to state and local positive law, as well as custom and usage having the force of law." *Brown*, 923 F.2d at 1480; *McMillian*, 88 F.3d at 1577.

Plaintiffs have not alleged that Fulton County had any policy or custom of retaliation against employees. (*See* Pls.' Br. [35] at 36.) Plaintiffs contend, however, that Gates was the final policymaker for the adverse personnel decisions at issue in this action and, therefore, that Fulton County may be found liable under Section 1983. Fulton County argues that Gates's personnel decisions could have been appealed to a Personnel Board, and so he is not the final policymaker. (Fulton Cnty's Br. [26] at 24.)

A government official "does not have final policymaking authority over a particular subject matter when that official's decisions are subject to meaningful judicial review." *Scala*, 116 F.3d at 1401 (citation omitted). In *Scala*, plaintiff brought

suit against the city for his termination by the fire department, alleging that it was in violation of his First Amendment rights. *Id.* at 1398. The Eleventh Circuit held that the City Manager and the Director of Public Safety of the City were not final policymakers in regards to plaintiff's termination because their personnel decisions could be appealed to a Civil Service Board. *Id.* at 1402. "The City's governing documents provide employees with an opportunity for meaningful administrative review of termination decisions at the fire department, and there is no evidence that the Board merely rubber-stamps the decisions of the appointing authorities." *Id.* "Because the City Civil Service Board has the power to reverse any termination decision made by [the City Manager and Director of Public Safety], neither of them is a final policymaker with respect to termination decisions at the fire department." *Id.* at 1403.

Moreover, the fact that an employee who has received an adverse employment decision must file an appeal before the decision can be reviewed does not make the official who made the initial decision a final policymaker. *Denno v. Sch. Bd. of Volusia County, Florida*, 218 F.3d 1267, 1277 (11th Cir. 2000). "*Scala* clearly states that this circuit equates meaningful review with the opportunity for meaningful review." *Id.* "In other words, automatic review need not be made available when the opportunity for meaningful review is present." *Id.*

Fulton County uses a Personnel Board and Grievance Review Committee to hear appeals of employment decisions affecting employees who are discharged or who have suffered demotions, suspensions, or other perceived adverse actions. Fulton County Personnel Board and Merit System of Personnel Administration, 1982 Ga. Laws, p. 4896, § 9. Fulton County employees may file grievances "concerning general employment concerns, including working conditions, performance evaluation, classification and pay actions, selection

and appointment, placement and promotion, hours of work, relationships between employees, departmental and County policies and procedures, and any other employment-related issues, including any charges of alleged discrimination based on race, sex, religion, or national origin." Fulton County Procedure 100-24(C).[10] Permanent employees of Fulton County may appeal a dismissal to the Personnel Board. Fulton County Personnel Regulations § 800-2(1). The Fulton County Manager has the ultimate authority to resolve all grievances. Fulton County Personnel Regulations § 1700-3(2).[11]

The uncontroverted evidence before the Court is that meaningful administrative review existed to examine the decisions of defendants Gates and Reynolds.[12] Fulton County employees can file grievances with the Personnel Board if they have been subject to the type of adverse employment actions that the plaintiffs allege. Fulton County employees can appeal their dismissals to the Board, and the County Manager has final authority to resolve all grievances. These regulations show that the opportunity for meaningful administrative review of the decisions of Gates, the head of the Purchasing Department, and Reynolds, his assistant, existed. Neither of the defendants can therefore be considered a final policymaker. *See Scala*, 116 F.3d at 1401. And the fact that these grievance and appeal procedures were not automatic, that plaintiffs would have had to have taken active

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[10] Plaintiffs admit this to be true in paragraph 37 of their Response To Defendants' Statement of Material Facts [35].

[11] Plaintiffs admit this to be true in paragraph 38 of their Response to Defendants' Statement of Material Facts [35].

[12] Plaintiffs state only that "It is far from clear that the adverse actions of which Plaintiffs have alleged were appealable to the personnel board and grievance review committee of Fulton County." (Pls' Consolidated Br. in Opp'n to Defs' Mot. for Summ. J. [35].) As noted, they do not deny that the regulations set out by the defendants apply. In their brief, they set out no evidence that the regulations do not apply.

steps to invoke them, is of no consequence. *See Denno*, 218 F.3d at 1277. As Gates and Reynolds were not final policy-makers, Fulton County may not be held liable for their actions under Section 1983. Consequently, Fulton County's Motion for Summary Judgment [26] is **GRANTED**.

## *CONCLUSION*

For the foregoing reasons, the Court finds that defendants' Motions for Summary Judgment [26, 27, 28] and Plaintiffs' Motion to Extend Page Limitation [34] are **GRANTED**.

The Court will permit the plaintiffs, within **thirty (30) days** from this date, to file a motion for reconsideration that sets out clearly the factual and legal points identified earlier in this Order. The individual Defendants shall respond within **thirty (30) days** thereafter. *See* discussion, *supra* at 39.

SO ORDERED, this 28th day of March, 2003.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE